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AMERICAN CASES.

UNITED STATES DISTRICT COURT.

BOSTON, JANUARY, 1839.

Benj. Lowry, Jr., Libellant, v. The Steamboat Portland.

Upon collision between the Steamboat Portland, and the Schooner Cygnet, with damage to the Cygnet, in the passage between Thatcher's Island and the Londoner, on an evening in November, the Portland held not to have been in fault, having taken a course in conformity to common usage, keeping to the *right*, and the Cygnet having departed from such usage, unnecessarily, and improperly, having been previously in a course, which she had a right to keep, and ought to have kept.

Special emergencies or positions of vessels may allow and even require a deviation from the general rule or usage, but the Portland not held to be blamable for not making or attempting such deviation, under the circumstances appearing in evidence.

Nautical questions proposed to experienced navigators, in reference to the case, and their answers.

G. S. Hillard Proctor for the Libellant.

E. Haskett Derby Proctor for the Resp'ts.

Davis J.—The libellant alleges, that the schooner Cygnet, of which he was and is master, and part owner, was, on her passage from Bangor, in the state of Maine, on the evening of the 17th of November last, about half a mile south of the lighthouse on Thatcher's Island, near Cape Ann, forcibly struck by the steamboat Portland, R. S. Boyd, commander, sailing in an opposite direction, caused by an improper change of course, as is alleged, of said steamboat, by means of which the schooner Cygnet was damaged; that the knight heads and the timbers on the starboard side of the bow were broken; the corresponding timbers, on the starboard side, started and rendered useless, and the deck started and ripped off as far as the windlass. It is further alleged, that the wind was light, the Cygnet moving slowly,—the steamboat rapidly, and that there was room enough for the steamboat to steer clear, and pass by the schooner, without any damage whatever, and that the collision was wholly the fault of the persons navigating the steamboat Portland.

Damages are demanded to the amount of 650 dollars, viz:

For estimated expense of repair of the schooner, and men's clothing injured by water,	500
Sch'r Tamerlane for towing the Cygnet into Boston harbor,	50
Transportation of cargo of lumber from Boston to Medford, where it was to be delivered,	100
	$650

The Steamboat Navigation Company, owners and claimants of the Portland, in their answer, admit the collision, though not in the place specified in the libel, but deny all blame on the part of the Portland, in that occurrence, alleging that the collision, and incident damage to the Cygnet, were occasioned by the gross carelessness, inefficiency and mismanagement of the persons then in charge of that vessel. They aver that the schooner Cygnet was an old vessel, of inconsiderable value, and insufficiently navigated; that the steamboat Portland, strong and staunch, was, at the time stated in the libel, proceeding from Boston for Portland, in her regular employment, as a packet between those places, with many passengers, about one hundred and thirty in number, on board; that she pursued her usual course, through Broad Sound, with a four knot breeze from N. N. W., at her accustomed speed of twelve knots an hour, passing to leeward, according to invariable usage, all the numerous coasters, stated to have been more than thirty, which were met bound to Boston, having luffed or kept to windward, averred to be the established usage of the coast; that, about ten minutes before five o'clock, P. M. the Portland, pursuing her direct course, was within two miles distance from Thatcher's Island lights, in a narrow channel, between Thatcher's Island and the Londoner, near which it is averred, is a dangerous reef; that on entering that chan-

nel, in the usual route of the Portland for her destination, she kept well to the leeward, to give a wide birth to coasters coming from the eastward, all of which luffed and passed clear to the windward; that when the Cygnet was first discovered from the Portland, she was running a south south westerly course, through the passage, which would have carried her clear of the Portland, and to the windward; that when within half a mile, the Cygnet appeared to change her course and bear away towards the Portland, rendering it doubtful to those on board the Portland, whether it was intended to cross her bow, or pass to windward; that as soon as this deviation was noticed, five minutes, at least, before the collision, steam was shut off, pursuant to a signal given by the pilot, and the Cygnet was immediately hailed to luff; that this hail was not noticed, and was repeated four or five times, by the captain of the steamboat, with a trumpet; that, upon this, the Cygnet began to luff, and that, while hailing, the captain of the Portland gave the signal to stop the engine entirely, and back water; that this was accordingly done, and that as soon as the schooner began to luff, orders were given by the captain of the Portland, to the man at the wheel, to *hard up* the helm; that the schooner, having begun to luff, would have gone clear, although very near to the steamboat, when the captain of the Cygnet was heard, on board the steamer, to cry out, apparently in great agitation, "hard up your helm and call all hands"; that the helm of the Cygnet was then put hard up, notwithstanding repeated and earnest calls, from the steamboat, to luff; that the Cygnet, being thus made to fall off, ran her starboard bow against the stem of the Portland; that when the vessels came in contact, the Portland had lost all head way, and was going, at least a knot an an hour, astern; that when the collision took place, the Portland was close in to the southwest end of the Londoner; that the vessels immediately separated, with no damage to the Portland, and that so moderate was the motion of the Cygnet, at the time of the collision, the injury received should be attributed, mainly, to the age and weakness of that vessel; that all due assistance was given to the Cygnet and those on board, after the occurrence; that the Portland, at the time of the collision, could not have gone further to the leeward, without imminent risk of striking a dangerous reef, nor further to windward, without incurring great danger of being run into by the Cygnet, thereby endangering the lives of all on board, and property of great value. It is denied, that the collision was, in any way, ascribable to the fault of the Portland; they aver, that her master, pilot and crew, on that occasion, used the greatest care and skill in her management, took every possible precaution to prevent the occurrence, and were, in every respect, competent to perform the duties devolving on them; and, finally, that the collision was occasioned by the recklessness, want of skill and experience of the officers and crew of the schooner Cygnet, and that the owners of the Portland are not liable for the damages sustained, stated to be greatly overrated.

The character of this case, as indicated by the libel and answer, induced a suggestion, from the court to the counsel, that it would be a relief, and obviously promotive of a correct decision, if the court could be assisted, by experienced navigators, to hear the testimony, and give their opinions on the nautical questions that might occur. The suggestion had reference to the aid, occasionally given by masters of the Trinity House, on trials in the High Court of Admiralty in England, frequently acknowledged in the reports.

The intimation met with ready acceptance from the learned counsel, on both sides. Three gentlemen, selected by their agreement, and approved by the court, obligingly consented to attend the hearing, for the purposes that have been expressed; a duty somewhat irksome in a protracted examination, but which they have faithfully performed.

The evidence given, at a hearing of long continuance, was contained in depositions, or derived from examination of numerous witnesses, officers, mariners or passengers in the respective vessels, and of persons, called to testify relative to usages at sea in such instances, especially on the eastern coast, and as to the amount of damage sustained.

A statement of facts, of material bearing in the case, is contained in the report of the referees. After the evidence and arguments, *five* questions were proposed to the referees,

by the court, one by the libellant's counsel, and several by the counsel for the respondent. The referees were requested to give their opinions on these questions in writing, and to express an opinion, also, on any points which might occur to them, in consideration of the evidence, which might not be comprehended in any of those questions.

The questions proposed by the court were these:

1. What are the nautical rules, or usages, applicable to this case, from the time when said vessels came in sight of each other, until the collision which ensued?

2. If there be a general rule, or usage, which should govern *sailing vessels*, under the circumstances, evidenced in this case, would such rule be inapplicable to the case, from the circumstance that one of the vessels was a *steamboat*?

3. Was there a deviation from such rule, or usage, by either of these vessels; if so, was there any justifiable or reasonable cause for such deviation?

4. If there was such deviation, by either of said vessels, on that occasion, was it induced, and rendered expedient or proper, from any reasonable ground, to infer that the other vessel had, or probably would take a course, requiring or authorizing such deviation?

5. Was there any, and if any, what blamable act, or omission, at any stage of the occurrence, to which it would appear, from the evidence, that the collision is to be imputed?

On a subsequent day, those gentlemen made the following report:

"The undersigned have duly considered the questions submitted to them by the Court, in the case of the schooner Cygnet versus the Steamer Portland, and respectfully submit the following answers:—

"To the First Question they answer—That the course to be taken by vessels, when approaching each other from opposite directions, is not so clearly and universally understood and settled as to establish an *absolute rule*; but the general practice, both upon our coast and *elsewhere*, is that when two vessels approach each other, both having a free, or fair wind, the one with her starboard tacks aboard keeps on her course, or, if any change is made, she luffs so as to pass to the windward of the other, or, in other words, each vessel passes to the right.

"To the Second Question they answer—That a steamer is considered as always sailing with a fair wind, and is therefore bound to do whatever a sailing vessel, going free, (or with a fair wind) would be required to do, under similar circumstances, in relation to any vessel she may meet.

"To the Third Question they answer—That they think there was a deviation from the common usage by those on board the schooner Cygnet, in keeping her off, when she ought to have been kept on her course, or luffed, and they are unable to discover sufficient cause for such deviation. There is some discrepancy in the testimony in this case, but not more than might be expected when the excitement of the occasion, the different position of the witnesses on board the two vessels, and other circumstances that occurred, are taken into consideration. The testimony, taken together, establishes the following facts in the case:—On the evening of the 17th November last, as the schooner Cygnet was passing through the strait between Thacher's Island, and the "Londoner," steering S. S. W., with a moderate breeze from N. N. W., those on board of her discovered the steamer Portland, about one point on her weather bow, three or four miles distant. The schooner was then kept off about one point, and shortly after, another point to the southward. The steamer was then steering a little to the eastward of N. N. E.—thus bringing the schooner nearly ahead, and she was discovered by those on board of the steamer about three fourths of a mile in that direction. Soon after discovering the schooner, the course of the steamer was changed to the eastward, the necessary measures taken to diminish her speed, and when the danger of collision became imminent, the machinery was reversed so as nearly to stop her way before the two vessels came in contact. Had the schooner been kept on her original course, S. S. W., it is evident the collision would not have taken place, and she would have passed to windward of the steamer, as she ought to have done, especially after it was discovered that the steamer had kept off to the eastward, with the apparent design of passing to the leeward.

"To the Fourth Question they answer—That the course taken by the steamer was in conformity to what may be considered the usage in such cases, and they do not perceive that those on board of the schooner had "reasonable ground" to expect that a different course would be taken.

"To the Fifth Question they answer—That the collision was the consequence of the change in the course of the schooner, which ought not to have been made in that direction. The error, however, was unintentional, and the undersigned are fully satisfied, that both parties did that which appeared to them, at the moment, most likely to avoid the accident.

"The question put by the Libellant cannot be answered, unless the courses and distance of the two vessels are given; and a reply to those put by the Respondents is embraced in the answers here given to the court.

BENJ. RICH,
WM. STURGIS,
FRANCIS DEWSON."

In considering this report of the referees, I have been led to compare their results with the cases cited at the hearing, and they appear to me to correspond, or to be in no conflict with those authorities.

The case of the *Woodrop Sims*, (2 Dodson 83) was pertinently referred to, by the counsel for the respondents. The brig Industry, being on a course, which she had a right to keep, according to marine usage, was run down by the Woodrop Sims, and sunk. It was holden by the court, assisted by Trinity House masters, that the Woodrop Sims was to blame; that she had the wind free, and ought to have got out of the way.

So the Cygnet, though not close hauled to the wind, as the Industry was, yet, before her deviation, was in a southwesterly course, which she had a right to keep, being on the starboard tack. A steamer is properly viewed, as always having a fair wind. The Portland changed her course to the right, which would have avoided the Cygnet steering south south west, if she had continued that course. The Portland did in this case, what the Woodrop Sims was considered as culpable for not doing.

The cases cited for the libellant, do not appear to me to sustain the allegation that the Portland was in fault. The cases are *Handayside et. al. v. Wilson et. al.* (3 Carrington and Payne's reports, 538,) and *The Shannon* (2 Haggard, 173.)

In the first mentioned case, which was before C. J. Best at Nisi Prius, there is a recognition of the principle or rule of the sea, that when a vessel is going close hauled to the wind, and another is approaching, in an opposite direction, *going free*, the latter is to go to leeward, and although such vessel may go either to leeward or windward, as she best can, yet she ought, as a general rule, to suppose that the vessel going to *windward* will keep her position. This case, considered in reference to the principle on which it proceeds, would bind the Portland, had she met the Cygnet on her original course, to pass her either to windward or *leeward*, i. e. to luff or bear away, as she best could. But it sustains the course taken by the Portland, under the circumstances, as having a right to presume, that the Cygnet would keep her original course.

The other case cited for the libellant, was on a demand for damage, done by the steamboat Shannon, to a vessel called the British Union. The Shannon was coming down the English channel, on the starboard tack. The Union was sailing up the channel. The counsel for the Shannon relied, in her defence, on the rule of navigation, upon ships meeting, and there being a doubt of their going clear, that the one on the starboard tack is to persevere in her course, the other to bear away. But the court sustained the argument of the opposite counsel, that the rule of navigation should be applied according to the character of the two vessels, and concurred in the opinion given by the Trinity House masters. Steamboats, it was holden, from their greater power, ought always to give way, and that the Shannon was farther bound to do so, as she had seen the Union, four or five miles off, and was fully enabled to go clear. In the present case, it was the Cygnet that bore away, after the Portland was seen by her. The change of course eastwardly, by the Portland, was taken with a discreet regard to any vessels that might be coming in an opposite direction. From that mutual diversion of courses the collision ensued, and no blame can be imputed to the Portland, unless it were practicable for her

to avoid that occurrence by any management, after the Cygnet was seen approaching, in a direction, that would bring the vessels in contact.

In the answer to the first question, proposed to the referees, it is cautiously observed, that the rule, which they mention, is not absolute. There are not many rules completely absolute, and subject to no exceptions. Instances may be stated, in which the general rule to be observed, by vessels approaching each other, should be disregarded; the object in view, a passage without collision, being attainable, more certainly or readily, by a breach of the rule than by its observance.

There is much good sense, and, it may be presumed, a conformity to good seamanship, in the remarks made by the counsel and the court, in the case before C. J. Best. "I apprehend," said serjeant Jones, "the rule of the sea to be this, that the ship, which has the wind, is so to use it as to avoid the other, and is to take that course, which, under the circumstances, is the most prudent and safest course. There is no law, either of the sea or the road, by which a person is justified in adhering to a particular course, when it will be productive of mischief."

"I agree," said C. J. Best, "with one observation, made by my brother Jones, that although there may be a rule of the sea, yet a man, who has the management of one ship, is not allowed to follow that rule, to the injuring of the vessel of another, when he could avoid the injury, by pursuing a different course. But if the matter comes into any doubt, for instance, in the case of a dark night, then we ought to look to the practice, as that which is to regulate the parties."

All this appears perfectly reasonable, and cases may occur, in which the general rule, that a vessel on the starboard tack should keep on her course, and steamboats keep to the right, should not be observed. Such deviations, however, from general rules or usages, obviously imply the necessity for a full and satisfactory view of all particulars, rendering such deviation urgent or eligible. At the time when those vessels entered the narrow passage, between Thatcher's Island and the Londoner, in opposite directions, the general rule should have been observed. It was observed by the Portland, bearing away to the right. The Cygnet should have kept on her course, or if any change were to be made, should have luffed, and in either way she would have gone clear.

The views of the case, taken by the referees, clearly place the Cygnet in fault, for the imminent danger of collision, into which the vessels were brought, when the Cygnet was seen in near approach to the Portland; but admitting the Cygnet to have been in fault, in this particular, it would remain to be determined, whether it was in the power of the Portland, by any variation of course, to have avoided the threatened collision. It appears, from the evidence, that the Portland could not safely bear away further to the eastward, on account of the dangerous reefs on that side of the passage near the Londoner; but it remained to ascertain, whether a course might not have been taken to the left, with a fair prospect of passing in safety. That the attention of the referees might be specially directed to this point in the case, and their views obtained, the following additional questions were proposed to them:

1. Whether, in the opinion of the referees, the steamer Portland, at any time, after the discovery of the Cygnet, on the evening of the 17th November last, and knowledge of her course, could have avoided collision, by being put on a course *not conformable* to the general rules or usages of the sea, specified in the answers to former questions on the subject?

2. Whether it was reasonable, prudent or expedient for the conductors of the Portland to have adopted, or attempted such a course? or,

3. Whether what was done on board the steamer, on that occasion, was the only, or the best practical mode of proceeding, under the circumstances?

These questions received the following reply:

"We have no doubt that a course might have been taken by the Portland, after the discovery of the Cygnet, that would have prevented collision; but we think the course actually taken was, under the circumstances, the proper one; and it might reasonably have been expected that the error committed on board the Cygnet, by taking an improper course, would be corrected, up to a period so

near the moment of collision, as to render it impossible to change the course of the Portland in time to avoid it; and we do not think it would have been "reasonable, prudent, or expedient" for the conductors of the Portland to have adopted a different course at an earlier time, for had it been attempted, and a collision ensued, we think they would have been liable for the consequences. In view of the whole case, it seems to us that the conductors of the Portland did all they ought to have done to avoid collision.

"In our answers to former questions, we have stated the rule, or usage, to be, that when two vessels are approaching each other, both having the wind free, and consequently the power of readily controlling their movements, the vessel on the *larboard* tack shall give way, and thus each pass to the right. This rule should govern vessels, too, sailing on the wind, and approaching each other, when it is doubtful which is to windward; but if the vessel on the larboard tack is so far to windward that if both persist in their course the other will strike her on the leeward side, abaft the beam, or near the stern, in such case the vessel on the starboard tack must give way, as she can do so with greater facility, and less loss of time and distance, than the other. These rules are particularly intended to govern vessels approaching each other under circumstances that prevent their course and movements being readily ascertained with accuracy—for instance, in a dark night, or dense fog. At other times, circumstances may render it expedient and proper to depart from them; for we consider them all subordinate to the rule prescribed by common sense, and applicable to all cases, under any circumstances, which is, that every vessel shall keep clear of every other vessel when she has the power to do so, notwithstanding such other may have taken a course not conformable to established usage. We can scarcely imagine a case in which it would be justifiable to persist in a course, after it had become evident that collision would ensue, if by changing such course the collision could be avoided."

The explanations, in reference to the point suggested, are satisfactory, and I concur in the views expressed by the referees, in this instance, as well as in the answers to preceding questions. It is a relief to receive their valuable aid, in the questions occurring in the case, of ready disposal, probably, to them, from their known intelligence and experience in nautical tactics, but of a perplexing character to the court, without the assistance, which they have afforded. They have my thanks for the care and attention, which they have bestowed, in executing the duties of their appointment. They may reflect, with satisfaction, that they have, not only given correct opinions, for the disposal of this case, but have contributed information, that may tend to prevent similar mishaps, and be a valuable auxiliary in the settlement of analogous cases, which may occur.

Incidents of this description are always alarming, frequently disastrous; especially may this be apprehended, when the impetus of a steam-vessel is to be encountered, from their size and velocity. By a careful observance, however, of a few rules and principles, and by vigilant attention, such occurrences may be in a great degree avoided, and steam ships may proceed, with their giant power, without dismay or danger to the humblest sail vessels, that may be plodding their "weary way," in their habitual occupations.[1]

In the present instance, upon full and solicitous investigation, there appears no fault on the part of the steamer. Whatever of error or mistake there was in the occurrence, was on the other side. The libel must be dismissed, but from the favorable impression, expressed by the referees, in reference to the libellant's views and motives, and from a consideration of other circumstances, permitted to have an influence, the suit will be dismissed without costs for the respondents, excepting, that the compensation of the referees is to be equally borne by the parties.

[1] One of the schedules annexed to an interesting Report, recently made to Congress by the Secretary of the Treasury, is a *List of material accidents and loss of life and property, by explosions and other disasters which have occurred to Steamboats, in the United States.* The whole number is 215, commencing with the Washington, on the Ohio river, in 1816. Of the above number of casualties only six were by collision. The number of lives lost, by disasters in steamboats, had been computed to have been 2000, or more. "I have been able," says the Secretary, "to ascertain only 1676 killed, and 443 wounded in steam boats; and 37 killed and 98 wounded by accidents to locomotives and standing engines."—The full and valuable information, given in that Report, with its accompanying documents, may be expected to lead to the adoption and observance of efficient regulations, by which the danger to life and property, in the application of steam power, may be materially diminished.

UNITED STATES CIRCUIT COURT.

BOSTON, OCTOBER TERM, 1838.

Charles F. Adams and others v. George Bancroft, Collector of the Port of Boston and Charlestown.

Construction of the Act of Congress of 1832, Chapter 224, and of the Act of 1833, Chapter 54.

By the Act last above mentioned, French silk gloves are free of duty upon importation.

Laws imposing duties are not construed beyond the natural import of the language, and duties are never imposed upon the citizens upon doubtful interpretations.

ASSUMPSIT for money had and received. The parties agreed upon the following statement of facts:

"The plaintiffs in November last, imported a quantity of silk gloves from France. The defendant, who is collector of the port of Boston and Charlestown, in this District, refused to permit them to be entered free of duty, and required the plaintiffs to pay thereon a duty of twentythree and a half per centum *ad valorem*. The plaintiffs protested against this claim as not authorized by law, but as they could not otherwise obtain possession of their property, they paid to the collector the sum of two hundred and ninety dollars, being the amount of duties claimed by him on the said merchandise, at the same time requesting him not to pay over that money to the United States, as they intended to commence an action against him to recover it back."

The cause was argued by *Smith*, in the absence of the District Attorney, for the collector, and by *C. P. Curtis*, for the plaintiffs.

Story J.—This is an amicable action to ascertain whether under the Tariff act of 1833, chapter 54, French silk gloves are free of duty upon importation. By the 4th section of that act, it is among other things enacted, that there shall be admitted to entry free from duty, "Worsted stuff goods, shawls, and other manufactures of silk and worsted, manufactures of silk *or of which silk shall be the component material of chief value*, coming from this side of the Cape of Good Hope except sewing silk." That these silk gloves came from France, and of course from a place this side of the Cape of Good Hope, is admitted; and that they are manufactures of silk is perfectly clear, so that they seem to fall within the descriptive words of the section, and as such are free of duty. Unless there be some other section in the act of 1833, or in some other act, which qualifies or modifies this general exemption, there would seem to be an end of the matter.

But it is contended on behalf of the United States, that such a qualification or modification results by implication of law from the provisions of the Tariff act of 1832, chapter 224. The argument is in substance this, that in the second paragraph of the second section of the act of 1832, mitts and gloves are made subject to a specific duty of twentyfive per centum, and silk gloves fall within this description, and at the fifteenth paragraph of the same act which lays a duty "on all manufactures of silk or of which silk shall be a component part, coming from beyond the Cape of Good Hope, ten per centum *ad valorem*, and all other manufactures of silk or of which silk is a component part, five per centum *ad valorem*, except sewing silk, which shall be forty per centum *ad valorem*," was intended to cover other manufactures of silk, excluding silk gloves, and that the act of 1833 repealed the duty only on manufactures of silk, which are within the fifteenth paragraph.

It appears to me, that the argument is not well founded upon the true construction of the act of 1832. The second paragraph of the second section of that act appears to me to refer entirely to goods composed wholly or in part of wool. To lay a duty "on all milled and fulled cloths of which wool shall be the only material, &c. five per centum *ad valorem*, on worsted stuff goods, shawls, and other manufactures of silk and worsted, ten per centum *ad valorem*, on woollen yarn four cts. pr lb. and fifty per centum *ad valorem*, on worsted, twenty per centum *ad valorem*, on mitts, gloves, bindings, blankets, hosiery, and carpets and carpeting, twentyfive per centum, (with certain exceptions not necessary to be named,) on flannels, bockings and baizes, sixteen cents the square yard, and upon merino shawls made of wool, all other manufactures of wool, or of which wool is a component part, and on ready made clothing, fifty per centum *ad valorem*." Now, construing this clause according to the ordinary rules of interpretation of statutes of this sort, it seems to me difficult to maintain, that any

other articles were within the scope of the paragraph than those which are wholly of wool, or of which wool is a component part. Every other article except mitts, gloves and bindings would certainly fall within that predicament. Mitts, gloves, and bindings may be of that material, and the closing words, "all other manufactures of wool or of which wool is a componant part," afford a very strong presumption, that this must have been the intent of the Legislature, as they grammatically as well as logically, mean "other" than the preceding enumerated articles.

One of the best settled rules of interpretation of laws of this sort is, that the articles grouped together are to be deemed to be of a kindred nature, and of kindred materials, unless there is something in the context, which repels that inference. *Nosciter a sociis*, is a well founded maxim applicable to revenue as well as penal laws.

But the fifteenth paragraph of the same act still more fully demonstrates, that this must have been the intent of the Legislature. That paragraph declares the duty "on all manufactures of silk or of which silk shall be the component part, coming from beyond the Cape of Good Hope, ten per centum *ad valorem*, and on all other manufactures of silk or of which silk is a component part, five per centum *ad valorem*, except sewing silk, which shall be forty per centum *ad valorem*." Now this paragraph plainly in its terms includes all manufactures of silk, except sewing silk. Upon what ground, then, can the court say, that all manufactures of silk are not to be deemed included in the sense of that statute, when they fall within the terms? Certainly it is incumbent upon those, who insist upon any exception, to establish that it unequivocally exists. It is not sufficient to show, that it might possibly exist consistently with the words. It must be shown positively to exist. If the legislature had intended to except silk gloves, the exception ought to have been found in the paragraph: "Sewing silk" is excepted, and in such a case the exception of one thing is equivalent to an affirmation of the exclusion of all other manufactures of silk in the paragraph. *Exceptio probat regulam de rebus non exceptis.* Besides, if the second paragraph is to be construed as including silk gloves under the denomination of mitts and gloves, it becomes repugnant to the generality of the fifteenth paragraph. If, on the other hand, it be construed to apply only to mitts and gloves of which wool is a component part, then the paragraphs are in perfect harmony with each other. In this way, all the language used has its fit and due application and meaning, and it is certainly the duty of courts of justice to give such an interpretation to every statute as, if possible, will make all its provisions consistent with each other. I may add in this connexion, that laws imposing duties are never construed beyond the natural import of the language; and duties are never imposed upon the citizens upon doubtful interpretations, for every duty imposes a burthen on the public at large, and is construed strictly, and must be made out in a clear and determinate manner from the language of the statute.

But even supposing, that the act of 1832 would admit of the interpretation contended for, so as to include silk gloves under the denomination of "mitts and gloves" in the second paragraph, still it would by no means follow, that the repeal would not be repealed by the act of 1833. The fourth section of this act declares that "worsted stuff goods, shawls and other manufactures of silk and worsted" shall be free of duty, thus directly repealing the duty on the very articles contained in the second paragraph of the second section of the act of 1832, above cited. Then follow the words "manufactures of silk or of which silk shall be the component material of chief value from this side of the Cape of Good Hope, except sewing silk," which are also declared free of duty. Now these words plainly in their natural and obvious meaning repeal all duties on manufactures of silk except sewing silk. How, then, can the court say, that other exceptions shall be engrafted in the words of the act? If silk gloves are still to pay duty, what manufactures of silk are not to pay a duty? No exception is made by the legislature but of sewing silk. What ground is there for the court to create other exceptions? how can the court say that it was not the policy of the legislature to repeal the duty on silk gloves as well as on other manufactures of silk? The act makes no such exceptions, and implies none. I profess myself utterly unable to comprehend what authority the court have to insert a positive exception into

the language of the act not necessary to its sense or to its declarations.

My judgment is that "silk gloves" are by the act of 1833 free of duty, and, consequently, that the plaintiffs are entitled to recover back the duties paid by them.

I wish only to add, that this action being between citizens of the same state could not have been within the jurisdiction of this court from the character of the parties, but it is brought within the jurisdiction of the court in virtue of the second section of the act of the second of March, 1833, chapter 56, which extends the jurisdiction of the Circuit Courts of the United States to all cases in law and equity arising under the revenue laws, for which other provisions are not already made by law. I have not thought it necessary, therefore, to examine into the form of the declaration, because the statement of facts agreed to by the parties clearly brings the case within the statute.

COURT FOR THE CORRECTION OF ERRORS.

ALBANY, N. Y., JANUARY, 1838.

The American Insurance Company, in error, v. John Ogdens and another.

If a vessel is seaworthy at the commencement of the risk, any subsequently occurring defect of seaworthiness, does not discharge the insurers from any loss or damage not ascribable to want of due diligence, but they are liable for any loss not caused or increased by, or in consequence of, such negligence.

The liability of underwriters for a constructive total loss is governed and limited by the same principles as their liability for an actual total loss.

If the absence of funds or credit to enable the master to repair his vessel in a port of destination, be caused by negligence in the assured, such negligence forfeits the right to abandon to the underwriters.

The circumstances which constitute such negligence considered.

THIS was an action on a policy of insurance, and was commenced in the Superior Court of the city of New York. It was there decided against the Insurance Company,—and this decision was affirmed in the Supreme Court—where it was carried by a writ of error—Mr Justice Bronson dissenting. The cause was argued before the Court for the Correction of Errors in July last, and at the present session the decision of the Superior Court and of the Supreme Court was reversed by a vote of *twentyone* to *one*. It is stated in the New York American, which is our authority in the present matter, that the history of the case and the particular points decided are most fully given in the opinion of

Mr Senator Verplanck.—After laying down the doctrine at some length, in which he concurred with the decision of the Supreme Court, "that the warranty of sea-worthiness as a condition on which the whole contract depends, is fully complied with, if the vessel is seaworthy when the risk commences; and that, therefore, the fact of the vessel not having been afterwards properly refitted as to any particular damage, at an intermediate port, does not discharge the insurer from subsequent risk or loss, not consequent on such defect." He proceeds:—

The facts presenting the second question in this cause are these:

The insured vessel, on her voyage from Norfolk to St. Thomas, a port of her destination, encountered severe weather, and arrived greatly damaged. The cost of repairs necessary to put her in condition for a return voyage was variously estimated, but there was no evidence to show that the damage amounted to half the value of the vessel; and the regular survey estimated the cost of such repairs at about one third of the sum at which she was valued in the policy. There were no funds whatever to meet this expense in the hands of the consignees, or the master, nor could any credit be obtained for the vessel. The whole amount of freight earned by the last voyage was absorbed by protested bills for the original outfit from New York returned on the master, and the vessel was thus left without either funds or credit for the daily supply of the crew. An attempt was made to raise money on bottomry, which failed. Finally, the master determined to abandon the vessel, and she was accordingly sold. The proceeds of the sale were just sufficient for the payment of the crew's wages, the expenses at St. Thomas, and the master's passage home.

There is no doubt of the master's good faith, and of the necessity of the sale, but

the question is whether that necessity (arising, as it did, from want of funds and credit,) is sufficient to authorize an abandoment, and to charge the insurers with a constructive total loss.

On this head I am constrained to differ from the majority of the Superior Court, (as well as the Supreme Court of New York,) and to concur with the dissenting judge, Mr. Justice Bronson, that the judgment below should be reversed. The doctrine of the abandonment for a constructive total loss, as has often been said, is a deviation from the strict contract of indemnity, which is all that the policy bears on the face of it. It ought not, therefore, to be extended by mere inference or implication, to impose any liability beyond what well settled legal decisions and known commercial usage have made the necessary, though implied conditions of the contract. Commercial usage, as acknowledged, evidenced and explained by judicial decisions, has pretty well settled the external circumstances, under which a loss, though partial in itself, shall be deemed total as against the underwriters, so as to authorize an abandonment as part of their contract.

Our own peculiar usage authorizes such abandonment when the damages amount to more than half the value of the vessel. This seems to have been drawn from the old French law, in opposition to that of England, which makes no similar allowance, as well as that of modern Continental Europe, which requires a damage of three fourths of the value.

The other grounds of abandonment are well stated by Mr Justice Story, (*Peele v. Merchants' Insurance Co.* 3 Mason 65,) who after reviewing all the previous cases, sums up the whole by saying: "If there be any general principle that pervades and governs the cases, it seems to be this—that the right to abandon exists when the ship, for all the useful purposes of the voyage, is for the present gone from the control of its owner, and the time when she will be restored to him in a state to resume the voyage is uncertain or unreasonably distant, or the risk and expenses are disproportioned to the objects of the voyage.

To the same effect the law is thus considered by Chancellor Kent: "It is a constructive loss if the thing insured, though existing in fact, is lost for any beneficial purpose to the owner." (3 Kent's Com. 318.)

Here, all the external circumstances give evidence of a case, where the vessel "was lost for any beneficial purpose to the owner;" and, in Mr Justice Story's words, "for any useful purpose, gone from his control." He had, therefore, a clear *prima facie* right to abandon.

But on the other hand, it is equally clear to my mind, that the insurer has a right to look behind that *prima facie* right, just as he has in regard to an actual loss, and to inquire into its cause. To me it seems self-evident, that the liability of the underwriter for a constructive total loss, must be governed and limited by the same principle with his liability for an actual total loss. If, in the case of an actual loss, he is discharged from liability by tracing the cause of that loss to the negligence of the owner or his agent, why is he not also freed from the responsibility of a constructive or technical total loss, if he can show that the necessity which is the *prima facie* ground of an abandonment however real, was yet the result of a culpable negligence? To both cases, the broad rule so well stated in the simple language of Lord Mansfield, (1 Burr. 341) is equally applicable, "The insurer ceases to be liable because he is only understood to engage that the thing shall be done free from fortuitous danger, provided due means are used by the trader to attain that end."

Thus, again, in a more recent leading case, *Tait v. Levi*, (14 East, 481,) where a loss occurred by the captain, through ignorance, taking his ship into a wrong port, it was held that it was a failure of the implied warranty that a captain of competent skill should be provided. Lord Ch. J. Ellenborough said, "there was gross negligence in sending a captain so totally ignorant of the coast," and this negligence discharged the underwriters from an actual total loss.

If, then, gross negligence, or want of due diligence as to any of the warranties, express or implied, of the conditions precedent, or subsequent, would have discharged the insurer, in this case, from the loss actually sustained by perils of the sea, if he could have shown such loss to be the consequence of such negligence, I can see no color of

reason why he should not have the same right to inquire into the cause of the necessity which is claimed as good ground of abandonment; and if that arose from gross negligence, to free himself from the responsibility for a constructive total loss.

On the contrary, it seems to be a necessary consequence of the great and broad principle of our insurance law, which binds the owner to good faith and due diligence, and makes him bear the loss consequent on any neglect of such duty, that the right of abandonment must be forfeited by the same sort of gross negligence as to providing means for the resumption of the voyage, which, in case of an actual partial loss, would have forfeited the right of recovery against the insurers.

I infer, then, that if the absence of funds or credit to enable the master to repair his vessel in a port of destination, was caused by negligence in the owner, that such negligence forfeits the right to abandon to the insurers.

This is to be distinguished from the doctrine broadly stated, and denied by the Supreme Court, "that the inability to procure funds to repair, or in other words, the inability to repair the ship, was not a good ground of abandonment." This, I do not maintain. On the contrary, I can imagine many cases, when even in a port of destination, sudden calamities, war, pestilence, bankruptcy of consignees, or the peculiar character of the place, as in a half civilized country, might exempt an owner from any charge of want of ordinary prudence and diligence, under circumstances otherwise similar to the present.

My position is simply, that an inability, whether to repair or procure funds to repair, arising from such gross negligence of the owner, as would have discharged the insurer from any actual loss thence resulting, discharges him also from constructive total loss, and takes away the right of abandonment.

The inference of this rule from the general principle appears to me so close and so necessary, as not to admit of any chain of argument, to allow of any further elucidation or to require any authority. To deny it, is to say that the owner may, by his wrong or negligence, gain an advantage to himself at the expense of his insurer, which he could not have gained by a strict and faithful compliance with the terms of his contract. It is to produce perpetual doubt and uncertainty in every similar case, and thus to introduce a new "element of discord," in addition to those, which Mr Justice Story has eloquently deplored as already existing in the law of abandonment.

The rule, as I have stated it, is in strict accordance with the principle stated by Phillips and laid down in *La Guidon de la Mer*, that the underwriter does not run the risk of the obstructions, occasioned by the debts, misconduct, insufficient acquittance, or neglect to pay debts, of the assured. (2 Phillips's Ins. 179.) It rests on the very same reasons with the decision in one of the most respectable courts of our Union, that when the assured, by mortgaging his ship, deprives himself of the power of transferring the title, he cannot, by abandoning her, recover against his underwriters for a constructive total loss; (*Gordon v. Mass. Ins. Co.* 2 Pick. R. 249,) where Chief Justice Parker said, "this is one of the cases in which the insured cannot claim a total loss by virtue of an abandonment, because by reason of the transfer, *he had disabled himself from putting the underwriters on the footing which they had a right to expect in case of a loss.*"

It rests, too, upon that same ground with that well settled and familiar doctrine, (see 1 Phillips's Ins. and cases there cited,) that the insurer is not answerable for losses occasioned through the fault of agents employed by the assured; and the reason assigned by Mr Justice Le Blanc, in one of those cases, (*Bell v. Carstairs*, 14 East. 382,) applies with equal force to the case of neglect in providing funds or credit. "If a loss happens for the want of that which the assured ought themselves to have provided, it could not have been within the intention of the parties, that the insurer should be liable."

The authority is strongly to the point of the present analogous case, and the reason seems to me conclusive as to both classes of neglect.

Such being the general rule, it remains only to inquire what it is that would constitute gross negligence in the ship owner in providing necessary funds, so as to prevent the inability of procuring them from being a

valid ground of abandonment; and how the doctrine applies to the case now before us. I think we are here warranted in charging the inability to the want of due diligence.

I have before stated cases, in which mere inability to raise funds, even in a port of destination, could not be reasonably imputed to any culpable negligence. An unexpected bankruptcy of a consignee, especially if connected with any general prostration of credit, and the necessity of large and expensive repairs beyond ordinary calculations of danger—the effects of any wide-wasting and general calamity at the port of destination, such as pestilence, or siege, or capture—these and other contingencies might render that impossible, which, under usual circumstances, would have been but the ordinary arrangement of any prudent merchant.—Again, the character of the port itself must modify the degree of expected diligence.

That want of funds, which would, under the same circumstances, be wholly inexcusable in a port of the United States, or of Europe, or her colonies, might be a matter of necessity in a port of Cochin China, or the coast of Africa. It is, therefore, difficult to lay down in precise words, any universal rule, as to the duties of an owner and his agents, in providing funds or credit to meet unexpected emergencies, the neglect of which should make him responsible for those losses which otherwise would have fallen elsewhere. Negligence is a relative term, and as is said by the books, in relation to the general doctrine of abandonment, "the right of the parties is to be judged of by the circumstances of each partioular case." (3 Kent's Com. 322.)

But the general principle is clear. The obligation of the ship owner is, and must be, the same with that of the "bailee for hire," or who takes charge of goods or property in consequence of some lucrative contract, as they are classed together by Sir William Jones.

In consequence of the mutually beneficial contract of insurance, the owner and his agents are intrusted with the interests of the insurer, so far as he may be concerned. But the general rule which governs all such contracts of bailment, and applies to all the analogous cases in the law of shipping and of insurance, makes the party so intrusted chargeable with "*ordinary neglect*," which is defined by Sir William Jones as "the omission of that care which every man of common prudence takes of his own concerns," (Law of Bailment, 118;) or to take the rule of our American commentator, who has analysed the same subject with still greater legal learning and not inferior talent, he must exercise "that common prudence which men of business and heads of families usually exhibit in affairs interesting to them." (Story's Law of Bal't, p. 8.) The mechanic, who, in consequence of a mutually beneficial contract, has under his charge the materials of his employer, the captain, who, in like manner has control of the property of his owner, and the owner, who has confided to him the interests of his insurer, must alike exercise a care, diligence, and skill adequate to the business, for the neglect of which they are all responsible, whilst they are not answerable for slight neglect or mistake, or for loss by an inevitable accident.

Now, what is ordinary diligence, or duty in respect to the providing funds in a port of destination, has been well defined by Mr Justice Sutherland, in *Van Buren v. Wilson*, (9 Cow. 168,) "It is the duty of owners to furnish the master of a vessel with the means of obtaining all the credit which the exigencies of a voyage may require." And on this ground the court in that case decided that the wages of seamen, which depend commonly on the earning of freight, and are lost when the freight is lost by disaster, can be recovered against the owner when freight is lost by his neglect; under which head of neglect, that of negligence in furnishing his vessel with funds or credit, was there expressly placed.

It is true, as was said by the Chief Justice in this cause, that this was not in an action between the insurer and insured, but in one for wages by seamen against their ship-owner. But the question of the duty and nature of due diligence towards those whose interests depend upon it, is the same in both; nor can I see any reason whatever to distinguish as to the responsibility incurred. To regard the law of insurance as standing entirely on its own insulated ground of precedent and authority, uninfluenced by the more general rules of jurisprudence, and unaffected by analogy to other parts of the law of

contracts and commerce, is in hostility with its rational and scientific spirit, and in contradiction to the authority of Mansfield and its other most illustrious expounders who have claimed for it the merit of being a science formed by deduction from reason and fixed principles; and not "merely an unconnected series of decrees and ordinances."

What the "ordinary" exigencies of a ship may be, which a ship-owner of common prudence would guard against; and again, what might be the unexpected circumstances or contingencies that would excuse the want of funds or credit to meet the exigences, must, as in innumerable cases arising under the law of bailment, of shipping and of insurance, be judged of according to the case.

The standard of sea-worthiness itself varies according to the voyage or the time. Mr Justice Story, in laying down the general rules of responsibility for due diligence in bailment (which must govern this special and peculiar sort of trust or bailment) with all the lights not only of profound learning, but of long judicial experience, is content to say that "diligence and negligence must be judged of by the habits of business, usages of society and the customs of trade." Still, here, (as Mr Justice Story says regarding the more general rule,) the decision "may vary as to facts, but is uniform as to principle."

It is culpable negligence to neglect the means of funds or credit in a port of destination such as any ship-owner of the commonest prudence would have had in the ordinary course of the same business. More than this cannot be demanded. It cannot be expected, for instance, in an adventurous and extensive trade carried on from our ports, that in a circuitous voyage, there should be provided funds or secured credit in every port at which she may touch, to the amount of one half the value of the vessel, to meet any possible exigency.

On the other side, it seems to ask no more than the discharge of ordinary duty to the owner and all who are interested, and of ordinary good faith to the underwriters, if it should be required that the vessel, unless other funds were provided, should be unincumbered with previous hypothecation or other debts; that the freight earned should be free to meet all the wages and expenses legally chargeable upon it, and that the vessel was not discredited in the eyes of her consignees and of those to whom resort for loans might be made, as to all future risks, by the general negligence as to the present one. As the master, in ordinary circumstances, carries with him in the vessel itself, a fund to meet unexpected difficulties, by his authority to raise money on her by sale or bottomry in case of necessity, that fund of last resort reserved for special exigencies should not be discredited, or impaired by debts for wages or for ordinary expenses for which the freight is answerable, or for previous debts that ought to be discharged out of other funds.

If the owner neglects this, our decisions will make him answerable to the seamen for wages; and on the same ground he must lose the right of abandonment for a necessity so caused, and look to his insurer only for the actual partial loss.

Between the two cases just stated there may be many degrees, but these must be judged of as they occur according to the case itself.

In the present case, however, there was no appearance of any sort of care, foresight or diligence, in relation to the subject. The master was not supplied at any of the intermediate ports of lading, with the means of meeting the ordinary expenses of his voyage. He had no funds at any of them, and was even unable to obtain an advance of ten dollars from his consignee at one of these ports.

The freight at St. Thomas, a port of destination, which was the natural fund for the payment of ordinary expenses and of wages, was exhausted by protested bills for the original out-fit, which had been sent out from New York. Every thing in the management of the business indicated negligence, and tended to impair that credit, which, had the ordinary expenses been met by the earned freight in the usual way, might perhaps have been obtained. It was a case not of ordinary, but of gross negligence; there was an entire want of diligence, the natural consequence of which, was an entire inability to procure funds or credit for repairing the vessel.

Upon the whole, I come to the conclusion, that the particular circumstances of the case

showing an entire want of ordinary care and prudence, in relation to funds or credit, the inability to provide such funds or credit to repair the vessel, did not authorize an abandonment so as to charge the underwriters, however necessary or proper the sale of the vessel by the master might have been in regard to other interests; and that, therefore, the charge of the learned Chief Justice, "that the inability of the master to procure funds at St. Thomas was a valid ground of abandonment," was incorrect.

I am accordingly of opinion that the judgments of the courts below, should be reversed.

SUPREME JUDICIAL COURT.

BOSTON, NOVEMBER TERM, 1838.

Before Chief Justice Shaw.

The Commonwealth v. Currier Barnard.
The Commonwealth v. Moses B. Worthing.
The Commonwealth v. Charles B. Mason.

On what principles courts will remit a part of the forfeited penalty of a recognizance of the bail in a criminal prosecution.

THE defendants were bail for Daniel J. Barnard, in this court, in the sum of $750, under the following circumstances:

Daniel J. Barnard was indicted in the Municipal Court, in the summer of 1837, for forgery. The indictment contained two counts, one for forging a check in the name of Harrison Fay, on the Mercantile (Merchants) Bank, for $493; the other for uttering it. He was admitted to bail by the Police Court, and appeared and took his trial at the Municipal Court, and was convicted. He claimed an appeal, and was required to get sureties in the sum of $1500, which he did not do, and was committed to gaol, where he remained till his trial in the Supreme Judicial Court. He was there tried, and convicted on one count in the indictment and acquitted on the other. Certain exceptions were taken by his counsel, and the points were reserved for the consideration of the whole court, and by order of court, *Wilde J.* sitting, the bail was reduced to $750. The three defendants became his bail, and before the law term in March he absconded and avoided, and has never since appeared. During the March term, to wit, in May, the principal and sureties were defaulted, and thereupon these actions were brought. The defendants were defaulted, and admitted the forfeiture of their recognizances, and prayed for a remission of the whole or part of the amount pursuant to the statute.

The case was argued before *Shaw C. J.* by *Dana*, of Charlestown, for the defendants, and by *Parker* for the commonwealth.

The chief justice subsequently delivered his opinion as follows:

Having heard evidence on the subject, I consider these facts to be satisfactorily proved;—that when Barnard was admitted to bail, he was dangerously sick, and that his life would have been in danger from a longer confinement in prison;—that this was the opinion of a respectable physician who visited him, and who believed that his sickness was real and dangerous;—that he so informed Barnard himself, and also his wife, who attended him some time in prison, and until she became unable to attend him any longer;—that his wife was pregnant and in feeble health;—that she applied to several persons, and amongst the rest to the defendants, to be bail for her husband, representing to them his situation, and the opinion of the physician;—that she induced four persons in Boston, including Mason, the defendant, who had formerly been his bail in the Police Court, to become his bail, in case there should be six, that is, each consented to be one of six:—that the wife then applied to the defendant, Currier Barnard, a carpenter in Charlestown, who had formerly been acquainted with the prisoner when a child, but who had recently no connexion with him;—that he enquired into the matter and then proposed it to Mr Worthing, the other defendant, also a carpenter, who had formerly been his partner;—that they enquired of Mr Mason, who had formerly been Barnard's bail, and who assured them that he had no doubt he would stay by, and abide the result;—they also enquired of Mr G. W. Phillips, one of Barnard's counsel, who assured them, that he thought there was no risk of his avoidance and forfeiting his bail;—that they were induced by motives of

humanity to become his bail, under a belief that his life was in danger from longer confinement;—that the whole six attended to become bail, but upon an intimation from the court, after three were called and examined, that they were sufficient, no intimation being given that it was intended, by having so great a number to decrease and diminish the risk, those three only were in fact taken, and the others have since declined taking any part of the burthen upon themselves, or of contributing to the relief of the defendants;—that after Barnard was admitted to bail, and had become able to work, the defendants, Currier Barnard and Worthing employed him;—that they exercised a suitable and proper vigilance over him;—that in about four weeks, without collusion with his bail, and without their knowledge or consent, he absconded;—that they took all suitable and proper measures by advertisement and otherwise to find him, with a view to surrender him, but without effect, and that neither his bail nor his wife have ever heard from him, or know where he is.

The only circumstance which excited any suspicion in the mind of one of the bail, that Barnard intended to avoid, that of his selling one or two of his tools, was, I think, satisfactorily explained. The offer to purchase the remainder of his tools was an expedient well calculated to put this disposition to a test, and his declining the proposal was sufficient to allay suspicion.

I think if Barnard's actual condition and state of health had been known, and the danger his life was in from further confinement, that if he could not have got the bail required, the court would have reduced it still lower. And if it had been made known to the court that the object of procuring so large a number as six, was not for the security of the government by having sufficient, but to diminish individual responsibility by distributing it among a larger number, the court would have so allowed it, whereby the burthen of the present defendants would have been much reduced.

I am satisfied, that in becoming bail, the defendants were actuated solely by motives of humanity, and not by any wish or expectation that it was done to enable the prisoner to elude public justice.

Under these circumstances, exercising the power which was vested in the court largely, to enable it to take into view all the equitable considerations which a wise and humane government would exercise under a full view of the objects and policy of the law on the subject, I am disposed to make a large deduction from the amount, for which the defendants stand legally liable, on the forfeited penalty of their recognizance.

The only strong objection to this course is, that if bail, after their principals have escaped, may easily avoid or greatly reduce their liability by an appeal to the equity and compassion of the court, that it will operate as a dangerous precedent, and induce others to become bail, in the hope of escaping from the legal and proper consequences of entering into that obligation.

But I consider that this will be no precedent for the reduction of the penalty in a case, where one lightly and recklessly becomes bail for a person charged with crime, without regard to his condition and situation, and solely for the ease and favor of the prisoner, without regard to the probability of his appearing to take his trial and abide all its consequence.

Still less would it be a precedent for such reduction, when the prisoner was bailed with the view of withdrawing him from the animadversion of the law; or, when after being bailed he remains away with the assent of of his bail, or of those, who have indemnified the bail, and for whose benefit such reduction is in effect asked. In this respect it differs entirely from the case of the *Commonwealth v. Dana*, (14 Mass. R. 65.)

Nor will it be a precedent in a case where the bail, having reason to suspect the intention of the prisoner to avoid, take no measures to surrender him to prison, or otherwise detain him; nor where, after he has absconded, they take no earnest, sincere and proper measures to discover and bring him back.

The passing of the law, vesting such power in the court, implies a belief on the part of the legislature, that there may be cases, in which it will be fit and proper to exercise it. Such circumstances, in my opinion, combine in the present case.

I think the sum ought to be reduced to an amount not greatly exceeding such sum as will amply indemnify the Commonwealth for

all its costs and expenses. It appears, that the taxable costs in the Municipal Court and Supreme Judicial Court, independent of the costs of these suits, amount to about $45. Under all the circumstances, I shall fix the sum to be paid by the bail independent of the costs of these suits, at $100. If judgment is rendered for this sum in each of these suits, on payment of the debt in one, and the costs of the three suits, the whole demand of the Commonwealth will be satisfied.

SUPREME JUDICIAL COURT.

BANGOR, ME., OCTOBER TERM, 1838.

Samuel J. Gardiner v. Salmon Niles and others.

In an action on a bond conditioned to remove certain incumbrances from land within a specified time; it was held, that the measure of damages after eviction is the amount of the incumbrance at the time judgment is rendered, notwithstanding the action was brought before any eviction and before any actual damage had been sustained.

This was an action of debt on a bond, and came before the court on exceptions to the opinion of the court below, rendered on an agreed statement of facts. The bond, which was dated December 20, 1834, was conditioned, that whereas the said Niles had on that day conveyed to the plaintiff a certain parcel of land in Bangor on which there then existed a mortgage in favor of one Crosby; "now if said Niles shall within ninety days cause said mortgage deed to be cancelled and all other incumbrances to be removed from said land, so that the same shall be free from all incumbrances as by his deed to said Gardiner he has covenanted, then the bond to be void, &c." The writ was issued on the 21st of December, 1835. It was agreed, that no part of the mortgage had been paid, and that in September 1836, Crosby entered, by virtue of a judgment and execution, on the land under his mortgage, for the purpose of foreclosing the same, and has ever since continued in actual possession; that at the time of the conveyance there was an attachment on the land in an action against said Niles, in which judgment was rendered in May 1837, and Niles's equity of redemption was sold on the execution; that no part of the mortgage or levy has since been paid by any one, and that the year from the time of the sale had elapsed during which Niles had a right of redeeming the equity.

Upon this statement of facts the only question was, to what damages the plaintiff was entitled, the defendants contending, that at the time the action was commenced no actual damage having been sustained nominal damages only could be recovered.

Charles Gilman for the plaintiff.

Blake and *Garnsey* for the defendants.

Weston C. J.—The defendants have failed to comply with the condition of the bond within the time limited, and they have not at any time removed the incumbrances therein embraced. The plaintiff, then, had a cause of action at the time when the suit was commenced, and was, at that time, entitled to judgment for the penalty. It is insisted, that he can have execution only for the damages which had then accrued. The practice of the courts has been otherwise. By the statute giving remedies in equity (Stat. of 1821, chap. 50, s. 3,) the court, in suits upon such bonds, is to enter up judgment for the penalty and to award execution for so much of the debt or damage as is due or sustained at that time. Under a similar statute in Massachusetts that time was held to refer to the time of the rendition of judgment, and not to the commencement of the action. The statute of 1830, ch. 463, provides only upon this point, that when the issue is to be tried by a jury upon breaches assigned, the damages are to be ascertained by their verdict.

It is further contended, that the plaintiff not having removed the incumbrances has sustained and is entitled to only nominal damages. The condition contains a positive and affirmative engagement on the part of the defendants to remove the incumbrances within a stipulated period. This differs from the covenant usually found in deeds of conveyance that the premises are free from all incumbrances. Cases, therefore, under such covenants are not strictly analogous. In *Prescott v. Trueman* (4 Mass. 627,) which is a leading case, the incumbrance then un-

der consideration and others put by the court by way of illustration, were such as had neither been extinguished nor enforced; for if the grantee had been actually evicted, by a mortgagee or by a party entitled to dower, it could not be said that he had sustained only nominal damages.

In *Boynton v. Dalrymple*, (16 Pick. 147) the condition was, substantially, that the grantee should not be disturbed in the enjoyment of certain lands which had been conveyed to him; and it was held, that there was no breach as long as he was not disturbed. In 4 Kent's Comm. 476, (2d Ed.) upon covenants against incumbrances he lays down the law to be, that if the purchaser has not removed the incumbrance *and there has been no eviction under it*, he shall recover only nominal damages inasmuch as it is uncertain whether he would ever be disturbed. Here the plaintiff has been evicted and the incumbrance arising from the attachment has become fixed. As he might have extinguished the mortgage by paying the amount liquidated in the conditional judgment, and also the incumbrance created by the attachment by exercising his right of redeeming the equity by paying the amount for which it was sold, these two sums with interest thereon constitute the measure of his damages, and he is to have execution accordingly.

Judgment for the plaintiff.

State of Maine v. Stover Rines and others.

In what cases a wife will be permitted to testify where her husband is a party.

THE defendants were indicted for a conspiracy to destroy the good name and reputation of Julia W. Rines, the wife of one of the defendants, and to cause it to be believed, that she was guilty of the crime of adultery, and also to procure her conviction for that offence, in order to enable her husband to procure a divorce from the bands of matrimony. At the trial of the indictment before *Perham J.*, in the court below, the attorney for the government offered Mrs Rines as a witness to testify in the case. To her admission the defendants objected, but the objection was overruled. Upon her examination the witness testified to certain conversations with her husband, and his conduct towards her, and to certain acts of the other defendants towards her.

A verdict having been rendered against the defendants, exceptions were filed to the ruling of the court as above. The case was argued at the June term, 1837, of this court, by *Clifford*, Attorney General, and *Jewett*, County Attorney, for the Government, and by *J. Appleton* for the defendants. At the present term, the opinion of the court was drawn up by

Emery J., who, after an elaborate and clear exposition of the marital rights, and the disabilities of the wife, and after the citation of several authorities, concluded, that there are only two cases in which the wife can be admitted to testify in cases where her husband is a party.

1. Where she has acted in any transaction as agent of her husband, she will be permitted to testify to her agency and her acts done in pursuance of it.

2. Where personal violence has been inflicted or threatened by the husband towards the wife, she may be admitted to testify to the fact.

As, in the case at bar, the facts testified to were not such as to come under either of the above rules, the wife could not be admitted as a witness. Nor would she be competent to testify to the acts of the other defendants towards her, inasmuch as such testimony would have a direct tendency to produce the conviction of the husband, as he could not be convicted of the conspiracy unless others were also convicted, however guilty he might be himself of the acts complained of. Mrs Rines' testimony ought not, therefore, to have been admitted.

New trial granted.

SUPREME JUDICIAL COURT.

MIDDLESEX CO., MASS., OCTOBER TERM, 1838.

[During the past month the whole court, with the exception of *Dewey J.*, have been engaged in the Court of Common Pleas' room in Boston, in considering the questions of law raised at the nisi prius terms in the county of Middlesex. Having been disappointed in obtaining satisfactory reports of the more important cases, we present the following abstracts, made while the court were delivering opinions, for what they are worth.]

PARISHES—ILLEGAL VOTING.

The case of the *First Parish of Sudbury v. Stearns*, was an action of *trover*, brought by the plaintiffs against the defendant, for having in his possession, and refusing to deliver up, the records of the parish. The great point in the case seemed to be, whether the defendant was the clerk of the parish, or rather who *were* the parish.

It appears, that in 1837, on the day of a meeting of the parish, sixtythree individuals, not members, filed with the clerk a paper, expressing their desire to be elected members, which paper was dated five days previous. They were objected to, but were allowed to vote, and in consequence, fiftythree members retired to a public house and organized themselves as the parish. They subsequently brought this action to recover the records of the defendant, who was the clerk elected by the other party, which also claimed to be the parish.

The court were clearly of opinion, that the sixtythree intruders had no right to vote, and that their votes ought to have been rejected by the moderator. To become a member of a parish, there must be a CONTRACT, to which the parish must assent, as well as the individual applying for admission. But the seceders were equally in error in withdrawing. They clearly mistook their rights. They should have remained and protested. The mere fact, that illegal votes are thrown, does not destroy an election, or entirely vitiate proceedings. If, by means of illegal votes, the person having a minority of the actual votes is declared to be elected to any office, the law will interfere, and place in his stead the person who was really elected by a majority of the legal voters. The persons in this case who threw illegal votes, would be liable to punishment, and the law would view the proceedings as if their votes had not been given. The party, then, who seceded, were in the wrong. *The Parish* remained. The defendant was elected by those who remained, and he has the legal custody of the records. Of course, the present action could not be maintained.

FALSE DISCHARGE OF A DEBTOR.

The case of *Wood v. the Sheriff of Middlesex*, was an action, brought against the defendant to recover damages for a false discharge of a prisoner from the jail, where he was imprisoned for a debt due the plaintiff. The debt and costs amounted to less than $20. It seems, that the sheriff in copying the notice to the creditor that the prisoner intended to take the oath, wrote "one o'clock, A. M." instead of "one o'clock, P. M." and the plaintiff alleged that he came at the former hour, to attend the disclosure, and that it did not take place until the last mentioned hour, when he was not present and the prisoner was discharged.

At the trial, the jury returned a verdict for the plaintiff for $3, that being his actual expenses in consequence of the mistake. He was not satisfied with this and moved for a new trial, insisting, that he ought to recover the whole amount of the original debt and costs. But the court held, that the verdict was right. If anything was wrong, it was, that the jury returned any damages at all. It might very properly have been argued to them, that the whole thing was a mere trick on the part of the plaintiff to get this debt out of the sheriff, as common sense must have enabled him to correct the mistake in the notification. It was in evidence, too, that the debtor was miserably poor, and he actually took the poor debtor's oath on this very debt. But as the defendant did not complain of the verdict of the jury, the court would confirm it and award judgment on the verdict for the plaintiff for three dollars and costs to a quarter part of that sum.

INSOLVENT LAW.

The case of *Bigelow v. Pritchard* was an action of *trover*, brought by Bigelow as assignee of an insolvent debtor under the late insolvent act, to recover damages for property attached by the defendant, as a deputy sheriff on a writ against the same insolvent debtor. The debt on which the property was attached, accrued before the first of August, when the new act went into operation. *Sprague* for the defendant contended, that the right of attachment in this case was a *vested right*, and could not be affected by subsequent legislation, and also, that it was within the saving clause at the end of the act. *Farley* for the plaintiff insisted, that the attachment was rendered void by the act. And the court were of that opinion. They

considered that the doctrine of vested rights did not apply to the case. The law did not affect the debt on which this attachment was made, but merely the *remedy for enforcing it.* They intimated, that if the attachment had been made before the act went into operation, it would not have been affected by it; but it was void in this case, as a different construction of the law would prevent the plain intention of the Legislature being carried into effect.

TRESPASS.

In an action brought by the plaintiff to recover damages of the defendant, who is a civil officer, for breaking and entering a building belonging to the plaintiff, it appeared, that the defendant had a warrant to arrest the plaintiff for stealing a certain article, which was specifically set forth in the warrant. The plaintiff, on being arrested, admitted that the article was in his shop, but said he had the key and would not give it up. The officer then broke into the shop and took the article. For this act the present action was brought. It did not appear what became of the complaint made against the plaintiff, but the court did not consider the point of the slightest moment in the present case. They had attentively considered all the points raised by the plaintiff, particularly those relating to the constitutions of this commonwealth and of the United States, and they were of the opinion, that the defendant had a right to proceed as he did, and that the statute under which he acted was not contrary to the constitution. This was not the case where an officer had a search warrant, and broke into a building *in order to search*, but in this case it was clearly ascertained by the plaintiff's own confession, that the article sought was in the building, and the officer had a right to make a forcible entry to recover it, under the circumstances.

PLEADING.

In an action brought to recover possession of certain mortgaged premises, the defendant, in the Court of Common Pleas, pleaded in abatement, that the summons was to appear at a different term from that named in the writ. The plea was considered in that court and was overruled. The case was then brought up to the Supreme Judicial Court by demurrer, and the defendant claimed that the plea in abatement should be brought forward and considered. But the court were clearly of opinion, that this could not be done, the plaintiff having already pleaded to the merits.

OFFICER'S RETURN.

In a case where an officer made a return on a writ, that he had attached a store of goods, &c. the court said that they considered the return too general and loose. It was extremely difficult to say with how much particularity a return should be made. It was clearly necessary, that the very articles attached should be identified without any uncertainty; but as the sheriff had made affidavit, that he shut the store up, and took the key, and soon after made a schedule of all the goods, they should order the papers to be remitted to the Court of Common Pleas, from whence they came, in order that the return might be amended.

PROMISSORY NOTE.

In a case where an action was brought on a note of hand against one of two joint promissors, and it appeared that the note was given for the accommodation of the party not sued, and that the defendant, before the note became due, had told the person who then held it, that if he was to pay it he should like to know it, in order that he might secure the amount of the other promissor, and the holder told him he should not be called upon; the court held, that the defendant was discharged entirely from the note.

MUNICIPAL COURT.

BOSTON, JANUARY TERM, 1835.

Before Thacher, J., and a jury.

The Commonwealth v. Francis Aglar and Ralph Huntington.

To act wilfully, is to act contrary to a man's conviction:—and when a person votes at an election, knowing at the time that he is not a legally qualified voter, it is a wilful act.

To constitute a wilful aider and abettor in such an act, he too, must know at the time, that the principal was an unqualified voter, and had no right to vote; and with such knowledge, he must have said or done something designed and calculated to encourage him to vote.

Knowledge is not to be presumed in such case, but is to be alleged and proved like any other fact.

When an alien not naturalized, or other unqualified person presumes to vote at an election of rulers, it is a wrong done to every citizen who is a qualified voter.

Until an alien has been naturalized, he is not a citizen, and he is not entitled either to vote in an election of rulers, or to serve on a jury.

But if such foreigner honestly believed at the time, that he had a right to vote, it would not be a wilful act within the act of 1813, c. 68, s. 3.

So, if it should appear from the evidence, that the aider and abettor honestly believed, that the foreigner had a right to vote, he would be entitled to an acquittal.

Whether a person is a qualified voter, is a question compounded of law and fact.

If the name of one qualified to vote is not borne on the list, he is not permitted to vote at the election.

But, although the name of an unqualified person may be borne on the list by mistake, it will not authorize him to vote.

The name on the list will justify the inspectors to receive his vote. But if they refuse to receive the vote of an unqualified person, although it is borne on the list, it would be no injury to him, nor just ground of complaint.

Parker, County Attorney, for the Commonwealth.

Hallett, *James* and *Park* for the defendants.

The prosecution grew out of circumstances, which occurred on the 2d Monday of November, 1834, at the ward room of Ward No. *nine*, in this city, during the election for Governor, Lieut. Governor, Councillors and Senators, and Representatives to the General Court of this Commonwealth, and for a Representative to Congress from District No. 1. The election was one of unusual interest. The case excited much interest also among the different parties, Whigs, Tories, Jackson men and Antimasons.

Mr Hallett quoted, in his argument, the answer of the Justices of the Supreme Judicial Court to a certain question proposed to them by the Senate as to the qualification of Voters, (11 Pick. R. 538,) *Lincoln v. Hapgood et. al.*,—(11 Mass. R. 350.) Also the answer of the Justices of the Supreme Judicial Court to certain questions proposed by the House of Representatives, as to ratable polls, 7 Mass. R. 523. And he relied much on the opinion of Chief Justice Shaw, in the case of *Josiah Capen v. Foster et. al.*, published in the Daily Advertiser and Patriot, Dec. 5, 1832. (12 Pickering, 485.)

The defence of Aglar was rested on the ground, that he acted innocently and under a mistake of right:—That of Huntington, that he assisted Aglar, and encouraged him to vote, finding his name on the list of qualified voters, and supposing that was conclusive evidence of his right. But the points of law and the substance of the evidence, will appear in the following instructions from the Court to the Jury, by

Thacher J.—The defendants are on trial for several violations of the law of 1813, c. 68, which was intended effectually to secure to the people of this commonwealth the rights of suffrage. The accusation against Francis Aglar is, that he knowingly, designedly, wilfully, and fraudulently attempted to vote, and give in a ballot of persons voted for, at the election of a Representative to the Congress of the United States from the first District, and for Governor, Lieut. Governor, Councillors and Senators, and for Representatives to the General Court of this Commonwealth, on the second Monday of November, 1834, in the city of Boston, said Aglar being an alien born, and not having been naturalized, and so not having a right to vote at that election, and well knowing himself not to be legally qualified to vote at said meeting.

The charge against Ralph Huntington is contained in the same indictment, and accuses him of the offence of wilfully aiding and abetting the said Francis Aglar in attempting so to vote illegally as aforesaid.

As the case relates to the freedom and purity of elections, the court has deemed it important, and has not felt disposed to restrain the counsel in the examination of witnesses, or in their arguments.

The indictment is founded on the 3d sect. of the act of 1813, c. 68, which is in these words:—"If any person, knowing himself to be not legally qualified to vote at any meeting for the choice of Governor, Lieut. Gov-

ernor, Senators and Councillors, Representatives to the General Court, or Representatives to Congress, shall wilfully give in, or attempt to give in a vote or ballot for any of the same then voted for, at any such meeting, every person, so offending, shall forfeit and pay a fine therefor not exceeding the sum of fifty dollars:—and any person who shall wilfully aid or abet any person, not legally qualified as aforesaid, in voting or attempting to vote, contrary to the provisions of this act, shall forfeit and pay a fine not exceeding thirty dollars for each and every such offence."

Upon the jury rests the responsibility of the verdict, and that they may correctly perform their duty, they should understand the nature of the offence.

The party voting or attempting to vote, must know at the time, that he is not a qualified voter, and that he is doing or attempting to do an unlawful act. If he voluntarily gives in a vote, or attempts to vote, with this knowledge at the time, his offence is consummated;[1]—it is done wilfully, and he incurs the penalty.

To constitute a wilful aider and abettor in such an act, he too must know at the time, that the person was an unqualified voter, and had no right to vote; and with such full knowledge he must have done or said something, which, in the opinion of the jury, was designed and calculated to encourage the party to vote, or to attempt to vote.

If the person charged as an abettor should honestly, though erroneously believe at the time, that the party voting or attempting to vote, had a right to do so, he will not be within the statute. For the offence both of the principal and the abettor is made by the statute to consist in having the guilty knowledge of the lack of legal qualifications, and the wilful intent to do the unlawful act. Therefore it is, that *knowledge* is not to be *presumed* in such case, but is to be alleged and proved like any other fact.

To make a person guilty of harboring a traitor or a felon, he must have at the time a full knowledge, that the treason or felony has been committed. Without this knowledge, no guilt can possibly be imputed to an individual who shall extend to the traitor or felon the common offices of humanity.

I consider that a free people ought to be jealous of their rights. It is the only way to preserve them. Foreigners not naturalized, who shall presume to intrude into elections should be indignantly resisted. For the sovereign power actually resides in the people. They elect their rulers to administer the government according to the constitution. When an alien not naturalized presumes to vote in an election of our rulers, it is a wrong done to every citizen.

It is the nature, perhaps the life of free governments to generate parties. But when a foreigner, or other unqualified voter, gives in a ballot at an election, it is a wrong to the voters of every party, without reference to the candidate for whom he votes. If one party should, by such means, gain an unlawful victory at one election, their antagonists will perhaps prevail by like means at the next. The State will become corrupt, and gradually lose its free character. Elections will come to be decided by illegal votes, and the people will in time find themselves governed by rulers not of their choice. I say, therefore, that it is a common injury; and I hope that, while any virtue remains in the people, they will be watchful over each other, and so preserve the foundation of the free body politic. If any citizen should become so recreant to duty, and to the principles of a free government, as wilfully to aid and abet foreigners in attempting to vote in our elections, before they shall have been naturalized, he ought to be made to suffer the penalty of the law.

But I am bound to add, that there has been, I believe, a neglect of caution in times past, which may have led many well disposed foreigners to consider themselves legal voters, when they were not in fact entitled to that privilege. Having resided here for years, and paid taxes; finding also their names on the list of voters, they have been permitted to vote and serve as jurors without distrusting their own right, or having it questioned by others.

But until an alien has been naturalized, he is not a citizen; and is not entitled either to vote in an election of rulers, or to serve on a jury. The payment of taxes is in return

[1] "By wilful," says Wilson J. (1 East, Rep. 563, note a,) "I understand contrary to a man's conviction."

for the protection of the government. Neither length of residence nor payment of taxes will constitute citizenship. If he was not born in the country, or if born abroad, if his parents were not citizens of the United States, not having renounced or forfeited their allegiance, he is a foreigner, and he must conform to the laws which regulate naturalization, before he can hold real estate, or exercise the freedom of election, as a citizen of the country.

It follows from these views of the law, that if a foreigner who has not been naturalized, should vote in an election, his vote not being legal; yet if he honestly believed at the time, that he had a right to vote, it would not amount to that wilful act which is forbidden in the statute.

And so also if a person should aid and abet such foreigner in attempting to vote; if it should appear to the jury, that he honestly believed, that the foreigner had a right to vote, they ought to acquit him of the offence.

Whether a person is a qualified voter, is a question compounded of law and fact. Those who prepare the lists may inadvertently err in their judgment, and lead others into error. If an alien, having resided in the country for many years, and finding his name on the list of voters, should use the privilege without question; it would be for the jury to consider, whether he might not naturally be led to believe, that he was a qualified voter.

But if presenting himself at the polls, and being interrogated, he should falsely assert, that he had conformed to the laws of naturalization; a jury might reasonably infer from that falsehood, that he knew at the time that he was not a legally qualified voter. Even a citizen may be ignorant of the law, and may innocently believe, that if the Mayor and Aldermen have placed the name of a person on the list of voters, it is conclusive evidence of his right, not to be questioned by the ward officers. Whether such citizen acted wilfully, in aiding and encouraging an unqualified alien to vote, or to attempt to vote, must be decided by the jury under all the circumstances of the case.

It has been argued, that the ward inspectors in this city may not question the right of one whose name is borne on the list of qualified voters, nor refuse to receive his vote. On this point, I have been requested to state my view of the law. No person, although a qualified voter, is permitted to vote at an election, unless his name is borne on the list. Although the name of an unqualified voter may be borne on the list by mistake, it will not authorize *him* to vote—he would do so at his peril. The name on the list will justify the inspectors to receive his vote, because it is not declared to be their duty to institute an inquiry. They may however, lawfully refuse the vote of one who is not a legal voter, though his name is borne on the list, when that fact has come to their knowledge, by the confession of the individual himself, or otherwise. In refusing to receive an illegal vote from an unqualified person, they do no injury to him—they prevent fraud—and they perform a meritorious act to the public. Since it tends to keep elections pure, and to perpetuate our government and law, in pristine health and vigor. It is part of the ministerial office of the inspectors, to prevent "all frauds and mistakes in elections," and to place a check against the name of each voter. In refusing the vote of one whose name is on the list, they would act upon their own risk, and would undoubtedly be liable to the action of the party, if he was a legal voter. Just as the Mayor and Aldermen would be liable to the action of a qualified citizen, whose name they should wrongfully refuse to insert on the list, whereby he should lose his privilege. Still, if the party had no right to vote at the time, he would sustain no wrong in either case, and therefore he would be entitled to no redress.

The first fact to be settled by the jury is, whether Francis Aglar wilfully attempted to give in a vote at the election held on the 2d Monday of Nov, 1834. If they should not be satisfied that he made this attempt, he must be acquitted: and it will then follow, that Ralph Huntington must be acquitted also, because his offence is charged as accessary to that of Aglar.

But it may be, that Aglar did attempt to vote at that meeting, in which case it will be necessary for the jury to inquire further, whether it was done wilfully, he having at the time the knowledge, that he was not a

qualified voter. If they are not satisfied, that he acted wilfully, he must be acquitted. But even if Aglar should be acquitted for this cause, if he made the attempt to vote through the wilful persuasion of Huntington, he knowing at the time, that Aglar was not qualified to vote, then though Aglar should be acquitted, it would be the duty of the jury to find Huntington guilty. It would amount to a substantive offence in Huntington: and it is not necessary, like the case of an accessary in the commission of a felony at common law, that the conviction of the principal should precede that of the accessary.

Therefore, if Aglar did not attempt to vote, Huntington must also be acquitted, whatever feeling or zeal he may have manifested at the time.

If Huntington advised Aglar to vote, and promised to stand by him in case he would vote; still, if Aglar did nothing in consequence of this advice and tender of protection, the offence was not consummated.

It is not made an offence under this statute to advise an unqualified voter to give in a ballot, not even if such advice is accompanied with an offer of protection. It may have been very improper, and contrary to the duty of a good citizen, to give such advice to an unqualified voter: but that is not declared to be an offence, and that is not the charge for which Huntington is on trial.

Having stated these general views of the law, the Court then referred to the evidence, to refresh the recollections of the jury as to the material facts. It did not appear, that there was any previous concert between Ag lar and Huntington—they were strangers to each other—all occurred in the ward room, during the heat of the election.

Aglar came to the polls, with a vote in his hand, undoubtedly intending to vote. As soon as he appeared, and before he tendered his vote, one of the inspectors asked him, whether he was a naturalized citizen. He immediately answered, that he was not. He was then told, that an alien not naturalized, was not a legal voter, and that if he voted, it would be at his peril. He said he had been in the country for twentyfour years, had paid taxes, his name was on the list of qualified voters, and that he had voted at former elections without question. He was told by the inspectors, that his name was indeed on the list, and that they would receive his vote; but that if he was not a naturalized citizen, he would be liable to prosecution.

While this conversation was proceeding, Huntington came forward, and having learnt that Aglar's name was on the list, insisted that was conclusive evidence of his right and qualification, and urged him to vote, promising at the time to hold him harmless from the consequences. Aglar said, that if he was entitled to vote, he should be glad to do so; but if he was not authorized, he would not vote. After a very animated contest, in which the inspectors offered the ballot box to Aglar to receive his vote, but without any attempt on his part to give it in:—he and Huntington left the room, in order to obtain legal advice on the subject. They went to Mr Samuel Dexter, and from him to Andrew Dunlap, Esq., by whom they were advised, that an alien not naturalized could not lawfully vote at that election. Aglar did not return to the polls, but Huntington came back, asked the names of the inspectors, and threatened to institute a prosecution against them for refusing the vote. The warmth on both sides led to further inquiry, and resulted in this prosecution.

Having recapitulated the evidence, which was in some points contrarient, but without attempting to reconcile the contradictory parts, the jury were cautioned to discard all party feeling, and not to indulge to hard constructions either of the law or fact.

It was not politic to attempt to restrain by severe regulation the freedom of elections. It was well, that the people should be alive on these occasions. It is proof, that they love their country, and take an interest in the government. Apathy is the worst state into which a free people can fall. All parties should stand for their rights. Errors committed by individuals in the fervor of the moment ought not to be severely criticised But it was for the best interests of the people, that wilful violations of law should be punished.

After a short deliberation, the jury returned their verdict, that the defendants were not guilty; and they were thereupon discharged.

DIGEST OF AMERICAN CASES.

[Selections from 17 Pickering's (Mass.) Reports.]

ACTION.

An action is deemed to have been commenced on the day of the date of the writ. Thus, where a writ was filled up and dated before the expiration of the time limited by the statute of limitations for bringing the action, it was *held*, that the action was not barred by the statute, although the writ was not served until such time had expired. *Gardner v. Webber*, 407.

ALIEN.

Under the statute of the United States, passed April 14, 1802, providing that the children of persons who then were or had been citizens of the United States, should, though born out of the limits of the United States, be considered citizens, it was *held*, that the child of a father who was a citizen of the United States after the treaty of peace with Great Britain by which the independence of the United States was acknowledged, and after the adoption of the constitution of the United States, was not an alien, although born without the limits of the United States. *Charles v. Monson and Brimfield Manuf. Co*, 70.

ARBITRATION.

All demands between the parties were submitted to arbitration, and the arbitrators were authorized, in case they should find the plaintiff indebted to the defendant, to estimate the value of certain chattels of the plaintiff, and the defendant was to take them in part payment. The arbitrators found the plaintiff indebted to a less amount than the value of the chattels, but instead of appraising so much only of the chattels as would pay the debt, they awarded that the defendant should take them and pay the plaintiff in money the excess of their value beyond the amount of the debt. *Held*, that the arbitrators had exceeded their authority and that the award was invalid. *Culver v. Ashley*, 98.

ASSUMPSIT.

1. Money obtained through fraud and misrepresentation may be recovered back in an action of assumpsit for money had and received. *Dana v. Kemble*, 545.

2. Where the defendant contracted with the plaintiff to act at the Tremont theatre for half the gross receipts of the house, it being understood by the plaintiff, that the terms were to be as favorable for the plaintiff as those on which the defendant acted at other theatres, and the defendant representing that they were so, and one night, after the play was over, and after it had been advertised that the defendant was to play the following evening, the plaintiff informed him that he had good authority for believing that he acted at another theatre on more favorable terms, but the defendant denied it and threatened that unless he were paid half the gross receipts he would not act on the following evening, and thereupon the plaintiff paid him, it was *held*, that this was not a voluntary payment, but that the plaintiff, upon showing that the contract was entered into through fraud and misrepresentation, might recover back the sum paid beyond the amount to which the defendant was justly entitled. *Ibid.*

BILL OF EXCHANGE AND PROMISSORY NOTE.

1. The payees of a promissory note, in common form, by a contract in writing of the same date as the note, agreed to take certain goods of the promissor, and apply what they could get for them in market on such note. It was *held*, in an action by the payees on such note, that the declaration need not set out such separate contract. *Sexton v. Wood*, 110.

2. After a promissory note discounted by a bank had become due, the bank, upon the application of the promissor for a renewal, indorsed on the wrapper of the note the words, "renewed for three months;" and the promissor paid the interest in advance, but the note was retained by the bank and no new note was given. It was *held*, that this indorsement did not become a part of the note; and that the bank was not thereby disabled from commencing an action upon the note before the expiration of three months. *Central Bank v. Willard*, 150.

3. The holder of a promissory note commenced actions thereon against the maker,

and against the indorser, and the maker brought into court the full amount of the note with interest. It was *held*, that the holder was not bound to accept it, unless the costs of both actions should be paid. *Whipple v. Newton*, 168.

4. The defendant put his name on the back of a negotiable note, to enable the payee to get the note discounted, and subsequently the payee negotiated the note, at the same time indorsing his own name above the defendant's name. It was *held*, that the defendant was to be regarded as an indorser, and that he was not liable as a promissor or a guarantor. *Pierce v. Mann*, 244.

5. An assignment of property by the maker of a promissory note not due, to a trustee in trust to indemnify the indorser against his liabilities for the maker, does not dispense with the necessity of a demand upon the maker and notice to the indorser. *Creamer v. Perry and Tr.*, 332.

6. The indorser of a note, who had received no notice of its non-payment, upon being asked what would be done about the note, replied, that "the note will be paid." It was *held*, that this was not equivalent to a waiver of notice, and did not render the indorser liable, as upon a renewed promise. *Ibid.*

7. Where a note is made by several persons payable to one of their own number, though payment cannot be enforced at law, as between the original parties, yet if it be indorsed to a third person, he may maintain an action upon it. *Pitcher v. Barrows*, 361.

8. Where a promissory note secured by mortgage was given in order to indemnify the promisee against any loss which he might suffer by reason of his subsequently indorsing for the accommodation of the promissor, and the promisee did accordingly indorse for the promissor, it was *held*, that such note was not void as against creditors of the promissor whose claims accrued after such indorsements were made. *Gardner v. Webber*, 407.

9. Before a promissory note, executed by two promisors, and attested by one witness, was delivered to the promisee, the name of another person was added to the note as a witness, without the knowledge of such person; but it did not appear that this was done by the promisee, and no fraud on his part was suggested. In an action upon such note it was *held*, that the addition of such name was not a material alteration, and did not render the note void. *Ford v. Ford*, 418.

CONTRACT.

1. The maker of a promissory note, after it became due, entered into a parol agreement with his creditors and F., by which it was stipulated, that F. should from time to time receive the maker's wages from his employers as they became due, for the benefit of his creditors, and that the holder of the note should receive payment of the note in monthly instalments, through the hands of F., and should not commence an action against the maker so long as the agreement should be complied with. Two of the instalments were paid in pursuance of such agreement. It was *held*, that such agreement did not constitute a legal defence to an action upon the note by such holder. *Walker v. Russell and Tr.*, 280.

2. In the same case it appeared, that F. informed the employers, that such an agreement had been made, and requested them to pay the wages to him; that they agreed that they would notify to F. when they were ready to pay the maker, and if the maker would sign the pay roll, and had no objection, they would pay to F. the amount due; and that the wages due to the maker for two months were accordingly paid over in his presence to F. It was *held*, that this was not equivalent to an assignment to F. of the wages which had subsequently become due; and that the employers were liable therefor as trustees of the maker. *Ibid.*

CONVEYANCE.

The owner of land conveyed two parcels thereof bounding them *by the harbour of Edgartown*, it being agreed, that he should lay out a way between the two lots, leading towards the harbour, for the use of the town. It was *held*, that the flats in front of the lots passed by the deeds although the description, both as regarded the quantity of land conveyed and the length of the lines, would have been satisfied by applying it to the upland alone. *Mayhew v. Norton*, 357.

DAMAGES.

1. In trover, the value of the property when converted, with interest from that time is in general the measure of damages, and if the property is restored, it goes in mitigation of damages; but if the restoration is obtained by the offer and payment of a reasonable reward, this amount, with interest from the time of payment, is to be deducted from the property restored. *Greenfield Bank v. Leavitt*, 1.

2. In an action against an officer for attaching a vessel bound on a voyage, the court instructed the jury to estimate the damages according to the value of the vessel at the time of taking, "and the additional damage sustained, if any." It was *held*, that this instruction would not justify the jury in assessing damages for the breaking up of the voyage. *Boyd v. Brown*, 453.

DOWER.

1. A widow is not entitled to dower in land covered with growing wood and timber, although it was used by the husband for the purpose of raising wood and timber as objects of profit, unless such land is assigned to her as part of her dower in connexion with buildings or cultivated land; and the widow in such case, is only entitled to cut such wood and timber as may be necessary for the supply of the dower estate, to be actually used and consumed thereon, or for purposes connected with the proper occupation and enjoyment thereof. *White v. Cutler*, 248.

2. After the dower had been assigned to a widow, in a dwellinghouse and the land connected therewith, consisting in part of woodland, all of which were occupied by the husband as one farm, she removed from the land and resided in another family at board, where she was supplied with fuel. The house having become untenantable, it was taken down with the consent of all parties. It was *held*, that neither the widow nor the lessee of the dower estate, had a right to cut the wood thereon for fuel; and that the reversioner would have a right to take such wood, if it should be severed by them. *Ibid.*

FIXTURE.

1. A fire-frame fixed in a common fireplace, with brick laid in between the sides of the fire-frame and the jambs of the fireplace, is a fixture, and a tenant cannot remove it after his lease has expired and he has quitted the premises, although it was placed there by himself; but he may remove it during the term. *Gaffield v. Hapgood*, 192.

2. The owner of a house under lease, offered it for sale by auction with a reservation of a fixture placed therein by the tenant, but the house was not sold. The tenant, at the expiration of his lease, sold the fixture and quitted the premises. It was *held*, that the vendee could not afterwards sever and remove the fixture. *Ibid.*

JUROR.

1. In general, if a juror, upon his answers on the voir dire, stands indifferent between the parties, other evidence is not to be introduced to show that he is under a bias; but if a cause of challenge exists which could not be known to the juror, it forms an exception to the rule and may be proved by witnesses. *Commonwealth v. Wade*, 396.

2. A member of the legislature is entitled to be excused from serving on a jury while the legislature is in session. *Commonwealth v. Walton*, 403.

PARTNER.

1. Where one of three partners retires from, or a new partner comes into the firm, or both, and notice thereof is given, but the business continues to be carried on, in other respects, as before, those partners as to whom no notice is given, will be presumed to hold the same relation to the concern afterwards, that they did before. *Howe v. Thayer*, 91.

2. In an action against several for a partnership debt, if one of the defendants denies that he was a partner, it is incumbent on the plaintiff, in the first instance, to prove such defendant to have been a partner; and if this is done, he will be liable, unless he proves a dissolution of the partnership as it regarded himself, and notice thereof to the plaintiff, before the debt was incurred. *Ibid.*

3. In such action, a witness testified in chief, that he had given notice of the withdrawal of such defendant, and of the general dissolution of the partnership, and that he was "confident that all in the neighborhood

were notified in two days." On his cross-examination, the plaintiff's counsel inquired whether he gave the same notice to the other creditors of the partnership as he had testified that he gave to the plaintiff; and the witness replied affirmatively, and gave the names of several, to whom he had given notice. It was *held*, that it was competent for the plaintiff to call the persons so named, to prove that the witness had not given them any such notice as he had stated; but that it was not competent for the defendant to call any of the persons named, in order to prove that they had received such a notice from the witness. *Ibid.*

4. Where notice of the dissolution of a partnership has not been published in a newspaper, or brought home to the knowledge of the party to be affected by it, evidence of the mere notoriety of the dissolution is not admissible to prove such notice. *Pitcher v. Barrows*, 361.

5. On the death of one of four partners and the consequent dissolution of the partnership, one of the survivors took out letters of administration upon the estate of the deceased partner, and the three survivors formed a new partnership and took to themselves the stock on hand, giving each his own individual note, for one third of the appraised value, payable to the three. It was *held*, that this supposed sale was ineffectual, and that the three surviving partners were *jointly* accountable to the funds of the old partnership, for the value of the stock. *Washburn v. Goodman*, 519.

6. Goods belonging to a partnership were consigned to a merchant abroad, for sale, part of them in the lifetime of all the partners, and the residue after the death of one of them and consequent dissolution of the partnership, by the surviving partners, and advances were made upon the goods by the consignee before and after the death, which went into the partnership funds and were applied to the debts of the firm; the consignee having no notice of the death. The proceeds of the sales fell short of the sums advanced. It was *held*, that the consignee's claim to reimbursement for the excess of his advances, as well upon the goods consigned after as upon those consigned before the death, was chargeable upon the partnership funds in the hands of the surviving partners. *Ibid.*

PRINCIPAL AND AGENT.

Where an agent employed to collect money in New York, and to remit it to the principal, lent it there to the defendants, to whom he was indebted in a sum larger than the amount lent, telling them, that he could lend it until he should be ready to return home, but without informing them that the money belonged to the principal, it was *held*, that the defendants could retain the money as against the principal, even after notice that it belonged to him. *Lime Rock Bank v. Plimpton*, 159.

RIVER.

1. Where an island is so formed in the bed of a river not navigable, as to divide the channel and lie partly on each side of the thread of the river, it will be divided between the riparian proprietors on the opposite sides of the river according to the original thread of the river. *Deerfield v. Arms*, 41.

2. Land formed by alluvion in a river is, in general, to be divided among the several riparian proprietors entitled to it, according to the following rule: Measure the whole extent of their ancient line on the river and ascertain how many feet each proprietor owned on this line; divide the newly formed river line into equal parts, and appropriate to each proprietor as many of these parts as he owned feet on the old line; and then draw lines from the points at which the proprietors respectively bounded on the old, to the points thus determined as the points of division on the newly formed shore. *Ibid.*

3. This rule is to be modified under particular circumstances; for instance, if the ancient margin has deep indentations or sharp projections, the general available line on the river ought to be taken, and not the actual length of the margin as thus elongated by the indentations or projections. *Ibid.*

SLANDER.

1. Under a count in an action for slander, alleging, generally, that the defendant charged the plaintiff with the crime of theft, it is competent for the plaintiff to give in evidence any words, which, although in their ordinary sense doubtful or even innocent, can be shown, by the aid of averments and

innuendoes, under the circumstances, to be equivocal or ironical, and to be intended by the defendant, and understood by the hearer, to impute such crime to the plaintiff. *Pond v. Hartwell*, 269.

2. In an action for slander, a count setting forth generally, that the defendant charged the plaintiff with a crime, (naming it,) is good. *Allen v. Perkins*, 369.

3. Under such a count, the plaintiff may prove, that the words spoken, although not actionable in themselves, were rendered so, by reason of the existence of certain extrinsic facts, a reference to those facts, and the mode in which the words were used, notwithstanding there was no averment that they were spoken with reference to any fact whatever. *Ibid.*

LEGISLATION.

MAINE.

At the present session of the legislature of this State, nothing of much interest to those out of the state has yet transpired.

Judicial Tenure.—A resolve to amend the constitution in relation to the judicial tenure has been adopted in the house by a vote of 121 yeas to 48 nays. This resolve provides that the judges shall hold their offices for seven years if not sooner disqualified. And that the question of the amendment of the constitution shall be decided by the people in September next.

Divorce.—We formerly[1] alluded to a report made by the judiciary committee accompanied with a resolve, which was adopted by both houses, "that to dissolve the marriage contract is the proper exercise of judicial power, acting according to the known laws of the State, and that the legislature cannot rightfully exercise such power." At the present session Ebenezer Cobb and Mary Cobb petitioned for a divorce, and the facts appeared to be, that the marriage had never been consummated; that the wife was many years younger than the husband, and was persuaded to marry him on account of his wealth; that she was deeply attached to another man; that she left her husband's house the third day after the marriage, and refused to return or even to see her husband. A bill to divorce them passed the house after a long discussion, but was refused a passage in the senate by the casting vote of the president.

Court of Common Pleas.—A bill to abolish the Court of Common Pleas has been adopted after much discussion.

In the senate, *Mr Boutelle* spoke at considerable length in opposition to the bill. He went into a history of the judicial system in the state, particularly in reference to the C. C. Pleas, and endeavored to show that the system of that court was good and had given general satisfaction to the people of the State. He could therefore see no good reason why the system should be abolished. The avowed object of the friends of this bill was to get rid of an obnoxious judge, and as to this argument he must say, that he did not approve of doing indirectly, what might be constitutionally effected directly. It is determined to drown him, but gentlemen have not the moral courage to walk up to him like men and throw him overboard at once, but they take the boat from under him and let him drown if he will. He considered it a fraud on the constitution, and establishing a dangerous precedent, and calculated to degrade the State in the estimation of our neighbors. He hoped the bill would not pass, and that the judiciary system would be permitted to stand unchanged in all the sanctity and respect, which time has gathered around it.

Mr Dumont was favorably impressed towards the bill under consideration, although open to conviction. He believed that our liberties in a great degree depended on an independent judiciary, and he hoped above all things, that this independence would never be destroyed. He loved and respected all the institutions of his country and would be the last man to wish to see any of them lightly tampered with. He spoke of the evils and grievances under which the eastern section of the State was laboring, and thought, that although the other parts of the State are not suffering under the same evils, we ought to afford a remedy. He objected to the removal of a judge by address, because it was so severe and would wound the feelings of the man, whom he deemed incompetent to the duties of his station.

[1] Law Reporter, No. 3, p. 81.

Mr Belcher did not believe that a more effectual method could be adopted to wound any man's feelings, than that pursued by his colleague, viz. openly and publicly to declare that he is utterly incompetent.

Mr Dumont replied to many of the remarks of Mr Belcher, and read petitions, resolutions of the Penobscot bar and other documents in support of his view of the question. He himself had occasionally attended the court in Penobscot and had seen scenes there, that were calculated to disgust every one.

Mr Belcher rejoined that the evidence introduced by his colleague did not touch the case. The complaints were against the *system*, which the senator acknowledges is not to be changed by this bill, and they say not a word about Judge Perham.

In the house, when this bill was under discussion, *Mr Vose*, of Augusta, said he could perceive no very material difference between the present bill and the existing act establishing the C. C. Pleas. He supposed it was not so much the intention of the gentleman who got this bill up to make any alteration in our present system, as to an ulterior object. He wanted the house to understand this. If it was the object of this project to get rid of one of the incumbents of that bench—if it was the intention to give him a side blow, it ought so to appear to the house, that they may act understandingly.

Mr Allen, of Bangor, said he would not deny, that that was one of the desirable objects which would be accomplished by the passage of the bill. But he denied that this would be all. An additional judge would be placed upon the bench. The interest of the eastern section of the State demanded the passage of this bill—the people of that quarter complained, and not without cause, that justice was not administered "speedily and without delay," according to their rights under the constitution—that they might as well abandon a suit for a debt of $1000 as attempt to enforce it in Penobscot county, under the present arrangement. The docket of the Penobscot court had on it thousands of actions undisposed of—and if this bill did not pass, they would not be likely to be diminished, in consequence of the incompetency of a part of the court. Justice to that county called for its passage.

Mr Cushman, of Dexter, said every man in Penobscot county was in favor of the passage of the bill; they had suffered long and much from the incompetency of this court, and they now demanded to be relieved from the "law's delay." They had a right to this under the constitution.

Mr Appleton, of Portland, had no objection, if the business of the county of Penobscot demanded it, that they should have an additional judge. This could be done without overturning the whole system as proposed by the bill. If it is the object to get rid of an incompetent judge, that can be accomplished without taking this round about course. The constitution pointed out the method of proceeding in a case like the present—and why not exercise your constitutional power to effect it. He considered it as taking an indirect and ill-advised course to do that which might be accomplished in a more direct and much better manner.

The bill then passed to be engrossed—ayes 81, noes 27.

Sureties on Poor Debtors' Bonds.—An act has been passed on this subject, and was occasioned undoubtedly by the decision of the Supreme Judicial Court in the case of *Knight v. Norton et. al.*, (Law Reporter, 264.) The act provides, that when the debtor has taken the oath required by law, and an action has been commenced against the sureties on the bond, the defendant shall have a right to have such action tried by a jury, who shall find and assess the damages, if any, the plaintiff has sustained, or if in their opinion, he has not sustained any damages, they may return a verdict for the defendants, notwithstanding there may have been in law a breach of the conditions of the bond. And, if the jury shall find a verdict for the plaintiff, judgment shall be rendered on the same without regard to the penalty in such bond.

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MASSACHUSETTS.

At the present session of the legislature of this Commonwealth, but little business has as yet been completed. From the many reports which have been presented by committees, we make a few extracts from one from the committee on agriculture, who were instructed by an order of the house, "to inquire into the expediency and practicability of reducing the salaries of the officers of the

Commonwealth and the other expenses of the State, so that the expenditures shall not exceed the ordinary receipts of the treasurer." The report is understood to have been drawn up by J. T. Buckingham.

Judges.—In regard to the salaries of the Judges of the courts, the committee say, that they have not perceived the reason why that of the Chief Justice of the S. J. Court should be $3,500 and that of the associate justices only $3,000 each. "It is not known to them that the Chief Justice has any more labor to perform than is demanded of his associates. They cannot learn from the inquiries they have made, that any extra duties are expected of the incumbent of that office, or that the qualifications proper to the discharge of those duties are acquired by more painful and laborious discipline, or demand more expensive accomplishments of learning and education. These observations may be applied to the salaries of the judges of the court of common pleas. The salary of the chief justice of that court is two thousand one hundred dollars, while his associates on the bench have one thousand eight hundred each. The salaries of all the judges, district attorneys, attorney general, and reporter of decisions, form an aggregate of no inconsiderable magnitude, and the committee have no hesitation in declaring it as their deliberate opinion, that this aggregate may be somewhat reduced without detriment to the public service. It should not be forgotten, that the offices of judges and registers of probate, attorney general, district attorneys, and reporter of decisions, are not incompatible with professional practice. All these officers are allowed to practise in the courts, and many of them, it is presumed, find their practice more profitable, in consequence of holding an official station. At any rate, these offices are objects of desire, as is abundantly proved by numerous and eager applications, whenever one of them happens to be vacant."

Reporter of Decisions.—Of this officer the committee remark: "The reporter of decisions of the supreme court in addition to the annual salary of one thousand dollars, receives all the benefit of the sales of the Reports. It is not known to the committee what the precise amount of the income is from this arrangement, but they learn that the work is stereotyped—that the plates are the property of the reporter—that the profits from the sales are sufficient to pay the expense of stereotyping—and that the net annual income from the sales, is not less than five hundred dollars. As this is, to a considerable extent, a matter of private speculation, and as the Commonwealth derives no other benefit from the arrangement than the privilege of purchasing three hundred and fifty copies of the reports at a rate a little less than the retail price, the committee do not see any good reason why the salary of this officer should be continued; or, if continued, why it should not be reduced to a mere nominal sum. Nor are the committee satisfied that it is good policy for the State to purchase these Reports for the use of the cities and towns at any price. To the great majority of the people they are of no use, for it is not supposed that one man out of a hundred knows that there is such a book in his town to be used as public property. In many cases, it is never referred to, unless by a lawyer or justice of the peace, who may not have it in his library, and is willing to avail himself of the advantage it may afford him at the town's expense rather than his own."

Attorney General.—"In reference to the salary of the attorney general, the committee have suggested no reduction. If the agency of such an officer is required, the salary may not be disproportioned to the service. But under the present arrangement of the business of the courts and the distribution of it among the district attorneys, it is doubted whether the office may not be abolished. But on this point, the committee express no opinion—leaving it to the decision of those who are more conversant with the peculiar duties of the prosecuting officer in the several counties, and with the effect which any new arrangement of those duties would be likely to produce on the public safety, and the due administration of justice. There is an opinion abroad in the community, that the inferior courts are mere channels for conducting all important cases, whether civil or criminal, to the jurisdiction of the highest tribunal. Whether this opinion be well founded, or otherwise, is not for this committee to determine. They think, however, that a general revision of the whole matter, by a proper committee, is desirable, as, whatever

the result of the investigation might be, it would doubtless tend to quiet dissatisfaction, if any existed."

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VIRGINIA.

The Court of Appeals.—The following resolution was offered in the House of Delegates of this Commonwealth on the 4th February last, and was laid on the table:

Resolved, That the committee for courts of justice inquire into the expediency of providing by law, that it shall be the duty of the highest civil, and the highest criminal courts of this Commonwealth, to report respectively to the general assembly, at the commencement of their session, the new legal principles involved in their judgments for the preceding year; and that the new principles of the decisions of the said courts may be printed, and distributed with the sessions' acts; and that the said courts also report any imperfection or omission of the laws by which, in their opinion, the speedy and impartial administration of justice may be obstructed.

Mr Smith, of Isle of Wight, said, that when this subject was last before the House, some mistakes had crept into the newspapers in relation to what had fallen from him, and therefore he deemed it necessary to say a few words on the resolution he had just offered. It would be perceived that the object of the resolution was to obtain a report from the highest civil and criminal courts in the Commonwealth, in reference to the new legal principles involved in their judgments for the preceding year, &c. His opinion was, that according to the principles upon which our government was founded, such a report ought annually to be laid before the general assembly. He regarded the judiciary as a branch of the executive government, although separated from it by our laws. It was decidedly his opinion, that all descriptions of judges whose province it was to administer the laws of the land, should lay their opinions yearly before the general assembly, as was now done by the executive of the commonwealth. Something ought certainly to be done to expedite the impartial administration of justice in this state. In looking over the report on this subject, he found that the business of the courts in different portions of the Commonwealth was fast accumulating, and they could not dispose of it in any reasonable time. He thought that the existing state of things was more attributable to the defectiveness of the law itself, than to any thing else.

In looking over the documents presented to the house, he saw that by the docket of the court of appeals for the year ending the 30th of August, 1837, the number of suits pending was 447, suits decided 103, and suits commenced 89. So that the docket was diminished, in the course of that year, but 14. It would require more than four years to try the suits pending, and about thirtytwo years to clear the docket. For the year ending the 30th of August, 1838, the suits pending were 480, suits commenced 116, and suits decided 104. So that there was an increase on the docket of twelve suits, and more than four years would be required to try the suits pending.

The latest report of the decisions of the court of appeals was in December, 1836. With regard to disposing of all the cases on the docket, that was altogether impossible, under existing circumstances. The decisions of the court of appeals, for the last two years, were not known to the people and the general assembly. He contended that there was much propriety in bringing to the notice of the general assembly these particular decisions of the court of appeals, and of distributing them, along with their acts, among the people. He thought that such information would be of the highest importance to the community at large. He hoped that the resolution would be adopted.

MISCELLANY.

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NOTORIOUS LIARS.

The ablest exposition of the law relative to the testimony of a witness whose general character for truth and veracity is bad, that we recollect to have heard, was made not long since by a distinguished member of the Suffolk Bar in an address to the jury in a civil action. After some evidence had been introduced in reference to the general character of a witness for truth and veracity, the counsel who called him urged to the jury, that, admitting his character to be bad, as he had no strong motive in the present case to

testify falsely, his evidence ought to be believed. The learned gentleman first alluded to replied, that such an argument betrayed an entire ignorance of the reason of the rule for admitting testimony respecting a witness' general character for truth and veracity. The object was not merely to prove, that the witness had been known to lie when it was for his interest to do so, but that HE WAS INCAPABLE OF TELLING THE TRUTH. It was wisely provided, that the rights of individuals should not be affected by the testimony of a notorious liar even when it was for his interest to tell the truth, because it was not considered possible for him to tell the truth. By a course of habitual deceit the balance of his mind was lost; his reasoning faculties had become blunted; a habit of loose, inaccurate and disorderly thought was engendered, and his mind was in a state of complete confusion. His mind's eye was dimmed. He could not see things as they were. The statements of such a man, when made in all sincerity, were not worthy of credit. His recollection was not to be trusted. The same habit that had destroyed his fear of lying had, at the same time, taken away his capacity for telling the truth, and the wisdom of the law provided, that a man who did not hesitate to lie when he was directly interested, was not worthy of credit when he intended to tell the truth.

COLLECTANEA.

The calender at the Middlesex Sessions, England in January last, presented the following facts:—There were eight prisoners, four males and four females, indicted for different felonies, of various ages between eighteen and forty, the united value of the property stolen being 1*l.* 3s. 9 3-4d. Four of the alleged felonies arose out of a theft of provisions, to wit, two potatoes, value three farthings, in one case, two loaves of bread, value sixpence, in another, six pounds of cheese, value four shillings, in a third, and a "neat's foot," to which no value was attached. To dispose of this "important" business, twentyfour jurymen were summoned from different parts of the metropolis, messengers, doorkeepers, police, &c., were employed, and the county put to a very considerable expense for witnesses—there being no less than four bound over in the "potato case" alone.

In the Court of General Sessions in New York on the 19th ult., Washington Townsend was arraigned and pleaded not guilty to an indictment, charging him with an assault and battery on John Reese, with intent to maim, &c., by throwing vitriol in his face. This outrage, which Mr Reese scarcely survived, caused much excitement in New York. It would appear from an article in a late Liverpool Mercury, that the offence is not of unfrequent occurrence in England. That paper says "we are sorry to find that the sentence of these individuals at the last sessions, to transportation for fifteen years, seems to have had very little influence in checking this most diabolical and cowardly practice."

The following remarkable case was tried at the Quarter Sessions for the county of Warwick, England, in January last:—John Scarrott, aged 77, John Scarrott, his son, aged 50, and Levi Scarrott, son of the last-mentioned John, and aged 14, were tried and convicted of stealing at Sturchall, on the 2d of November last, an ass, the property of Arthur Francis Gregory, Esq. They were sentenced to nine months' imprisonment. It appeared that they were gipsies, or travelling tinkers. The grandfather looked the worse for his years. His son was a powerful looking man, apparently not 40 years of age. The grandson was also a powerful youth.

In the court of the Borough of Norfolk, Va., recently, four negro boys were arraigned for burglary. Two of them were found guilty and were condemned to suffer the penalty of the law, which in the case of a slave, is death. The second Friday in April is appointed for the execution of their sentence. Their ages do not exceed sixteen. The first, said to be a fine active boy, belongs to a widow lady in Alexandria; the latter, a house servant, is owned by a gentleman in the borough. The value of one is fixed at $1000, and the other at $800, which sums are to be reimbursed to their respective owners out of the state treasury.

The New York Commercial Advertiser says that the Kent club of that city were "recently presented with a curious relic—nothing less than the Wig of the late Lord Chancellor Eldon. It was sent to William Kent, Esq. by a son of the late Sir James Mackintosh. Upon the head of our worthy Vice Chancellor, the wig appeared as well, as when worn by his lordship."

Willis Hall, of New York city, was, on the 4th of February last, elected Attorney General of N. York by the legislature. He had 88 votes, and Samuel Beardsley had 59. This election seems to give offence to a portion of the whigs. The New York American says, "the history of the manner in which this nomination was procured, would not bear the light"

A memorial has been placed at the Merchants Exchange, New York, for signatures, praying Congress to look into the fees charged in the U. S. Courts in that city, and setting forth that those fees have in some instances been most enormous and oppressive.

In France, in all cases of libel upon a public functionary, the defendant is allowed to prove his allegations, and he must within a certain period notify to the prosecutor the documents and list of witnesses he intends to produce in court.

It is not generally known, that Mr Fonblanque, the author of the Treatise on Equity, who died in 1837, aged 78 years, was the head of a Languedocian family, and inherited the title of marquis, although he never assumed it in England.

A negro boy belonging to Robert Kent, Esq. has been convicted of setting the fire which recently reduced the village of Wythe Court House, Va. to ashes. He is sentenced to be executed on the 22d of March.

TO OUR READERS.

An article on the *Exclusion of Witnesses for Unbelief* will appear in the next number; also the opinion of Judge Hopkinson in the *Case of Robert Morris' Estate.* An obituary notice of the Hon. Asahel Stearns, who died on the 4th ult. was prepared for the present number, but is necessarily omitted, and will appear in our next.